

THE
INSOLVENT ACT OF 1869;

WITH
TARIFF, NOTES, FORMS,
AND A
FULL INDEX.

BY JAMES D. EDGAR,

Of Osgoode Hall, Barrister-at-Law.

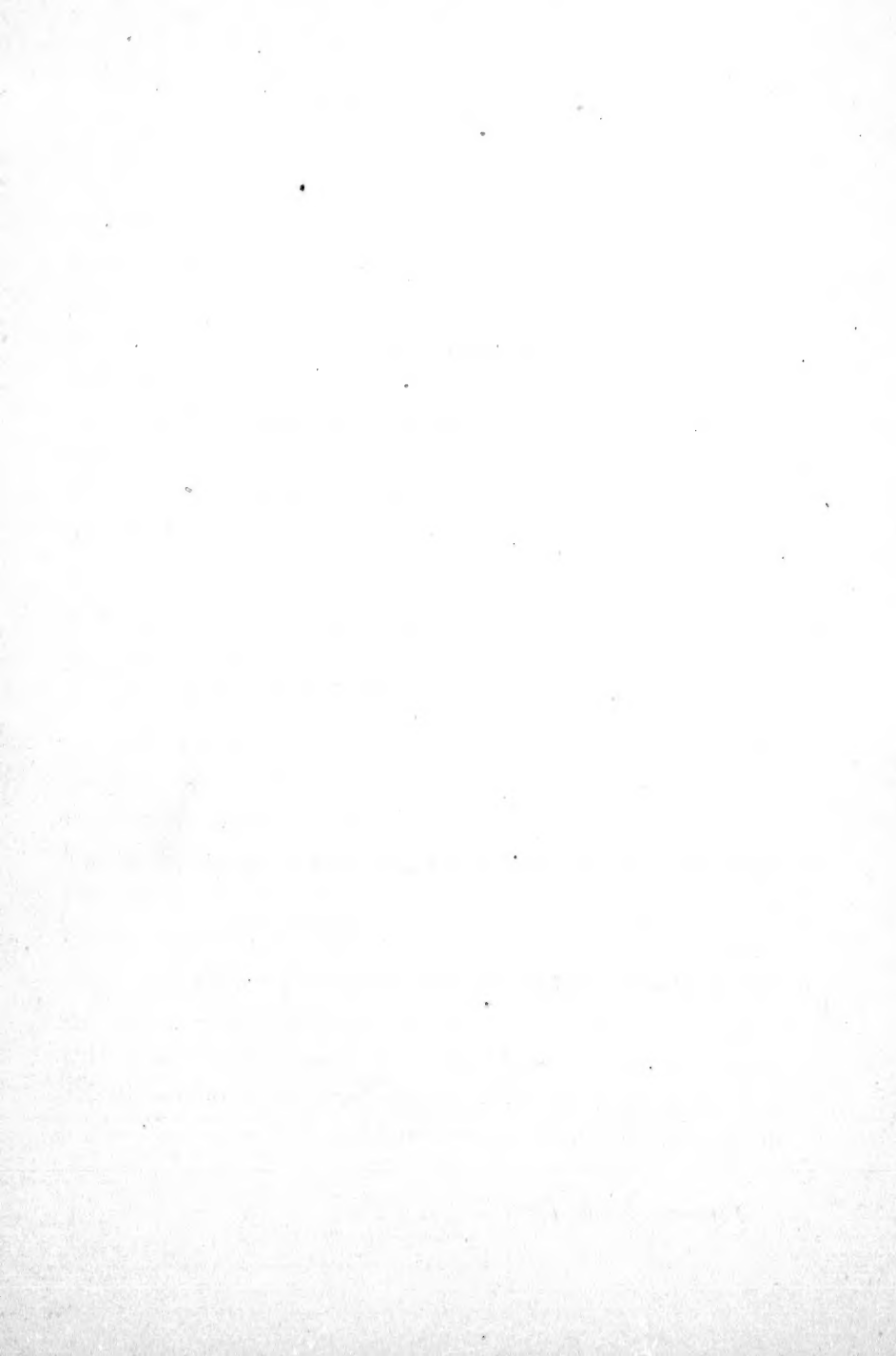
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TO THE HONOURABLE
WILLIAM HENRY DRAPER, C.B.,
CHIEF JUSTICE OF APPEAL,
THIS VOLUME
IS, BY PERMISSION,
RESPECTFULLY INSCRIBED,
AS A SLIGHT TRIBUTE TO HIS VARIED TALENTS,
AND AS A TOKEN
OF THE AFFECTIONATE REGARD IN WHICH HE IS HELD
BY THE PROFESSION, AMONG WHOM
HE HAS SO LONG AND SUCCESSFULLY LABOURED.



P R E F A C E.

Since the publication, five years ago, of an annotated edition of the Insolvent Act of 1864, a large number of decisions in our own Courts have thrown light upon this branch of the law. In the following pages will be found the result of a careful examination of these decisions, and also a reference to all cases of importance and relevancy decided in the English Courts during the same period. The points of chief interest in the Act are commented upon at greater length than in the former edition, and the number of cases cited has been more than doubled.

In the Province of Ontario no rules to regulate the practice in Insolvency have yet been made by the Judges of the Superior Courts, and without them no annotations to the Act can ensure uniformity in the procedure.

The Provinces of Nova Scotia and New Brunswick are now for the first time brought within the scope of an efficient bankrupt law. The notes of English cases in this volume will be of binding force in their Courts, while the decisions of our Ontario Judges of the Superior Courts of Law and Equity cannot be regarded as wanting in authority.

No effort has been spared to make the Index to the Act and notes complete and full. For valuable assistance in this, and other parts of the work, the author is indebted to Mr. F. H. Chrysler, B.A., Student-at-Law.

Toronto, Michaelmas Term, 1869.

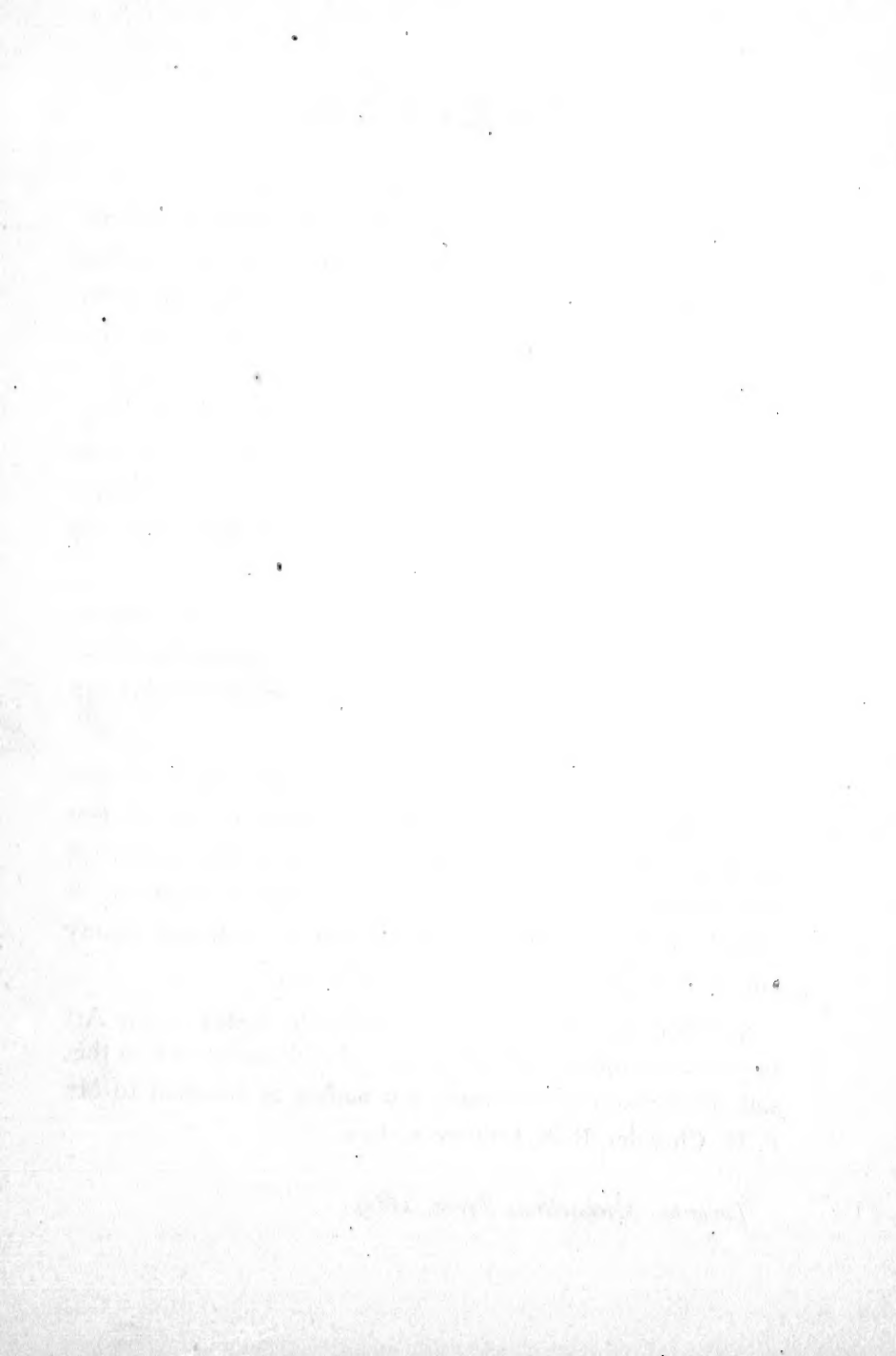


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TABLE OF ABBREVIATIONS.

A.

Abbott	Abbott's Insolvent Act of 1864.
Amb.	Ambler, Reports, Chancery.
Atk.	Atkyna, " "

B.

Ba. & Be. or Ball & B. .	Ball & Beatty, Reports, Chancery.
Bank & Ins. Rep.	Bankruptcy & Insolvency, Reports.
B. & A.	Barnwell & Alderson, Reports, K. B.
B. & C.	" & Creswell " "
Bing.	Bingham, Reports, C. P.
Black. W.	Blackstone, " K. B.
Bligh	Bligh, Reports Chy.
B. & P.	Bosanquet & Puller, Reports C. P.
Brod. & B.	Broderip & Bingham, Reports, C. P.
B. & C.	Brown's Chancery Cases.
Buck	Buck, Reports, Bankruptcy.
Burr.	Burrows, Reports, K. B.

C.

Camp.	Campbell, Reports, N. P.
Car. & M.	Carrington & Marshman, Reports, N. P.
Car. & P. or C. & P.	" & Payne, " "
C. C. Chron.	Chancery Cases Chronicle.
Chy. Chr. Rep.	Chambers, Reports.
C. B.	Common Bench Reports, Manning, Grange & Scott.
C. P. U. C.	Common Pleas, Reports, U. C.
Com. Dig.	Comyn's Digest.
Con. Stat.	Consolidated Statutes.
Cooke, B. L.	Cooke, Bankruptcy Laws.
Cowp.	Cowper, Reports, K. B.

D.

Dea.	Deacon, Reports, Bankruptcy.
D. & C.	" & Chitty, Reports, Bankruptcy.
De G.	De Gex, Reports, " "
De G., F. & J.	De Gex, Fisher & Jones, Reports, Chancery.
De G., M. & G.	" Macnaghten & Gordon, " "
De G. & S.	" & Smale, " "
D. & M.	Doria & Macrae on Bankruptcy.
Doug.	Douglas, Reports, K. B.
Dow. & L.	Dowling & Lowndes, Reports, Q. B.
D. & R.	" & Ryland " K. B.

E.

East	East, Reports, K. B.
Edens' B. L.	Edens' Bankruptcy Law.
El. & Bl.	Ellis & Blackburn, Reports, Q. B.
Esp.	Espinasse, Reports, N. P.
Ex., Ex. Rep. or Exch. Rep.	Exchequer Reports.

F.

Fonbl. Rep.	Fonblanque, Reports.
F. & F.	Foster & Finlason, Reports, N. P.

G.

G. & J.	Glyn & Jameson, Reports, Bankruptcy.
Grant	Grant, Reports, Chy.
Green	Green, Reports, U. S.

H.

Holt	Holt, Reports, K. B.
H. & C.	Hurlstone & Coltman, Reports, Exchequer.

J.

J. & H.	Johnston & Hemmings, Reports, Chy.
Jur.	Jurist, Reports in all the Courts.

L.

L. J.	Law Journal in all the Courts.
L. J. (N.S.)	" " (New Series).
L. J. U. C.	" " of Upper Canada.
L. R. Chy.	Law Reports, Chancery Appeals.
L. R. Eq.	" " Equity.
L. R. Ex.	" " Exchequer.
L. R. Q. B.	" " Queen's Bench.
L. R. C. P.	" " Common Pleas.
L. T. Rep.	" Times, Reports,
L. T. (N.S.)	" " " New Series.
Lord Ray. Rep.	Lord Raymond, Reports.

M.

Madd.	Maddock, Reports, Chancery.
M. C.	Magistrate's Cases.
Mann. Ind.	Manning's Index.
M. & S.	Maule & Selwyn, Reports, K. B.
Moll.	Molloy, Reports, Chancery.
Mon.	Montagu, Reports, Bankruptcy.
Mon. & A. or M. & A. . .	" & Ayrton, Reports, Bankruptcy.
M. & C.	" & Chitty, " "
M. D. & De G.	" Deacon & De Gex, " "
M. & McA.	" & McArthur, " "
Moo. & M.	Moody & Malkins, Reports, N. P.

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xxv

Moore Moore, Reports, K. B.
M. & Sc. " & Scott, Reports, C. P. & Ex.

N.

N. P. Nisi Prius.
N. S. New Series.

P.

Peake Peake, Reports, N. P.
P. W. Peere Williams, Reports, Chancery.
Ph. Phillips, " "
Prac. & Chr. Rep. Practice Court & Chambers, Reports.
Price Price, Reports, Chancery.

Q.

Q. B. Queen's Bench, Reports.
Q. B. U. C. " " Upper Canada, Reports.

R.

Rose Rose, Reports, Bankruptcy.
Russel. Russel, " Chancery.

S.

Salk. Salkeld, Reports, K. B.
S. C. Same Case.
Scott. Scott, Reports, C. P.
Sel. N. P. Selwyn Reports, N. P.
Sim. Simons, " Chancery.
Stark Starkie, " N. P.
Story Story on Partnership.
" Eq. Juris. " Equity Jurisprudence.
Str. Strange, Reports, Chancery.

T.

Taun. Taunton, Reports, C. P.
T. R. Term Reports, Durnford & East, K. B.

U.

U. C. Prac. Rep. See Prac. Rep.
U. C. C. P. See C. P. U. C.

V.

Vern. Vernon, Reports, Chy.
Ves. Vesey, Sr.
Ves. & B. or V. & B. Vesey & Beames, Reports, Chy.
Vin. Abr. Viner's Abridgment.

W.

W. R. Weekly Reporter.
W. Bl. Blackstone, Sir William, Reports, K. B.
Willes. Willes, Reports, K. B. & C. P.

INTRODUCTORY CHAPTER.

At once the most ancient and the most severe of bankruptcy laws was the code of early Rome. According to the usual interpretation of the law of the twelve tables the creditors of an insolvent debtor might, after some preliminary formalities, cut his body in pieces, each of them taking a share proportioned to his debt; and those, whose clemency forbade this ferocious exercise of legal rights, found a milder and more profitable form of chastisement in their privilege of subjecting the debtor to chains, stripes, and hard labour, or of realizing by a sale of himself, his wife and children, into a state of slavery. Even in Roman jurisprudence this severity was mitigated in favor of debtors, who made a complete and fair *cessio bonorum* in favor of general creditors; and personal immunity from death or slavery was accorded to those, who made an entire surrender.

In Scotland, where a most simple and practical system of bankruptcy is now in operation, all insolvents were at one time called *Dyvours*, and were regarded as fraudulent debtors. In the beginning of the seventeenth century the unfortunate *dyvour* was clad in a party-coloured garment, one-half yellow and the other brown, and in this attire was exposed, at intervals, upon the public pillory. Although this practice long ago fell into disuse, it was not abolished by law until 1836.

The derivation of the English word "bankrupt" is probably correctly given from *bancus*, a counter, and *ruptus*, broken. The custom having been with our indignant ancestors to "break the counters" of the insolvent Lombards, who still persisted in trading among them. Lord Coke, however, preferred to derive the term from some equivalent French or

Italian expression; and his patriotism induced him to add, "there is little doubt that the name, as well as the wickedness of bankrupts, was derived from foreign nations" (4 Inst. 277).

The Lombards did not long enjoy the distinction of being the only bankrupts. The Statute 34 & 35 Henry VIII. c. 4 was soon passed, and was entitled "An Act against such Persons as do make Bankrupt." In the preamble the consequences of the evil ensample of foreigners were depicted in the following language—"Whereas divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience." The grievances here described by the wisdom of parliament as so prevalent under Henry the Eighth, seem almost equally to pervade society in Victoria's reign.

The same act (32 Geo. 3, c. 1,) which introduced into Upper Canada the laws of England, as they stood on the 15th October, 1792, as the rule of decision in all controversies relative to property or civil rights, excepted the laws respecting the maintenance of the poor, *and respecting bankrupts*. The only authority of any English statutory provisions as to bankruptcy, or decisions founded upon that statute law, consists, therefore, in their analogy to our own law on the subject, and the assistance they thus afford in its interpretation.

A bankrupt law was first introduced into Ontario by the Statute 7 Vic, c. 10, entitled "An Act to repeal an Ordinance of Lower Canada, intituled '*An ordinance concerning bankrupts, and the administration and distribution of their estates and effects,*' and to make provision for the same object throughout the Province of Canada."

This act was assented to on the 9th December, 1843, and was only to continue in force for and during the term of two

years, and from thence to the end of the then next ensuing Session of Parliament. The certificate, which the bankrupt might receive thereunder, had the effect of discharging him from all debts due by him at the date of the commission, and from all claims and demands made provable under the commission. The provisions of this act extended only to traders, and the term "trader" was very strictly defined.

After the passing of this act, the portion of the community, who were non-traders naturally became desirous that they should also receive some protection against their creditors when they were willing to give up everything they had to pay their debts. The result of this feeling was the enactment of an Insolvency Law during the very next Session of Parliament (8 Vic., c. 48), whereby a person who was not a trader within the meaning of 7 Vic., c. 10, might obtain at first an interim, and then a final order protecting his person from being taken or detained under any process whatever in respect of debts due to his scheduled creditors.

During the operation of the Insolvent Act of 1864, which applied in Ontario to non-traders, the Act of 8 Vic. (Con. Stats. U. C. chap. 18), fell into entire disuse; but it is likely now to be again invoked for the protection of non-traders, to whom the Act of 1869 does not apply.

While the Bankrupt Act was in force, between the years 1843 and 1849, there were many instances of traders executing assignments for the benefit of creditors, at their request, for the purpose of avoiding the expense and delay attending proceedings in bankruptcy. And in some of these instances it happened that, notwithstanding the complete yielding up of all their property by such traders, some of their creditors afterwards declined becoming parties to such assignments. These traders, when the Bankruptcy Act was no longer in force, found that they had, without any culpable negligence, allowed the opportunity of taking the benefit of its provisions to pass. In order to afford relief in such cases 14 & 15 Vic., c. 116, was passed. Its aim was to enable traders coming within the above description to avail themselves of the Insol-

vency Act, 8 Vic., c. 48, in the same manner as non-traders might have done. It also enacted that the Final Order granted under the last mentioned act should, as to such persons, operate as a discharge of all debts due up to the date of their several assignments, as fully and completely as a certificate under the Bankruptcy Act would have done. This was in addition to the protection afforded by the Final Order against all process.

The Select Committee of the House of Commons, who were appointed in 1868 to enquire into and report upon the Insolvency Laws in force in the several Provinces of the Dominion, thus stated the position of legislation on the question.

"In New Brunswick there is no bankrupt or insolvent law whatever, nor are there any provisions of law under which the estate and effects of a person unable to pay his debts can be distributed among his creditors, otherwise than by the ordinary means of executions issued at the suit of those obtaining judgments, nor, under which the preferences and liens to which executions give rise under the common law and statute law can be avoided or set aside for the benefit of creditors generally.

"In Nova Scotia an act is in force for the relief of Insolvent debtors, but its operation is limited. It is rather a remedial measure, intended to supplement and mitigate the law of imprisonment for debt, than a complete system of insolvent or bankrupt law, having for its object the discovery and realization of the assets of an insolvent and his discharge from liability in consideration of the surrender of his property.

"This act, cap. 137 of the Revised Statutes of Nova Scotia, third series, permits a person imprisoned upon any writ of *mesne* process, execution, or attachment for non-payment of money issuing out of the Supreme Court to petition for his discharge. And upon complying with the condition prescribed by the act, he has a right to obtain an order discharging him from custody, in the suit or proceeding in which the warrant for his imprisonment issued. These conditions render

necessary a discovery by the Insolvent under oath of the property he possesses, and of the debts he has incurred, and require of him, as a preliminary to his release, the execution of a deed of assignment in trust, for the benefit of the debtor upon whose suit he was arrested. The effect of the order for his discharge seems only to release him from the restraint upon his liberty, actually imposed upon him in the suit or proceeding in which the order is made. And the assignment in trust seems only calculated to ensure to the benefit of the creditor, who is plaintiff in each case.

"The act, therefore, seems to afford to any creditor effective means for compelling payment of the debt due him; but its tendency must be to impede or entirely prevent the distribution of assets among creditors generally. And it affords no means by which, on any conditions whatever, a debtor once insolvent, can be enabled to continue his business with any hope of ultimate success.

"In the Province of Quebec no insolvent law is in existence except the Insolvent Act of 1864; although one of the principles upon which every system of bankrupt law rests is a leading feature of its common law. The right of the creditors of an insolvent to a just distribution of his assets among them all, has always been recognized by the Bar of Lower Canada; although the means under the common law of enforcing that right, were cumbrous and expensive. The effects of the debtor could only be realized under execution, and by this process only the minimum price of the goods sold was obtained."



THE

INSOLVENT ACT OF 1869.

32 & 33 VIC., CAP. XVI.

AN ACT RESPECTING INSOLVENCY.

[Assented to 22nd June, 1869.]

WHEREAS it is expedient that the Acts respecting Preamble.
Bankruptcy and Insolvency in the several Provinces
of Ontario, Quebec, New Brunswick and Nova Scotia,
be amended and consolidated, and the law on those
subjects assimilated in the several Provinces of the
Dominion; Therefore, Her Majesty, by and with the
advice and consent of the Senate and House of Com-
mons of Canada, enacts as follows :

1. This Act shall apply to traders only.

Application
of Act.

The Legislature has by this clause limited the application of the Act throughout the Dominion, to traders only. In Ontario, this limitation is new, except in applying the process of forcing an act of bankruptcy upon a trader ceasing to meet his commercial liabilities generally, as they became due. No authoritative decisions have been pronounced in the courts of this Province, giving a definition of "trading" that will remove the necessity of bestowing the most careful consideration upon this important point. In England, no other question arising under the bankruptcy laws has been so fruitful a subject of litigation. There the meaning of the word "trader" was defined by statute, in its relation to liability under the bankruptcy laws, as early as the reign of James the First. At the threshold of this enquiry, however, a difficulty is encountered in the language of the first Act passed by the Parliament of Upper Canada. The 32 Geo. III. chap. 1, which introduced the law of England up to that date, especially excepts "any of the laws of England respecting the maintenance of the poor, or *respecting bankruptcy*." Although, therefore, the words of the Statute 21 James I., chap. 19, sec. 2, are not strictly binding upon the courts of Ontario, their definition of a trader—"one seeking to gain his living by buying and selling"—is so much in accordance with the received notion of a trader, so accurate an expression of the broad and universal meaning of the word in all times and

in all countries, that cases decided upon the language of that enactment must furnish us with the best attainable illustration of the class in the community to which this Insolvent law will apply.

The English Acts of late years have laid down specifically, what persons are to be deemed liable, as traders, to become bankrupt, and a distinction has grown up between these specific designations, and the general description of mercantile classes. The distinction is this—the persons to whom these specific denominations are applicable, come within the Act, however little business they may transact in that capacity; but the other commercial classes only come within it, if their business holds a prominent position in their avowed means of living (1 Doria & Macrae, 84). If these statutory definitions are adopted in our courts as explanatory of the meaning of the term “trader,” there is not likely to be any such distinction preserved as that last mentioned, and the occupations enumerated must be followed as a means of livelihood to constitute trading under the Act.

To constitute a trading in law, there must be a buying and selling, or at least, an intent to sell; for a buying alone, without an intent to sell, or a selling alone without a buying, will not constitute such a trading (2 Com. Dig. Bankrupt, A); and the buying must be a purchase in the common and ordinary, and not merely in the legal acceptance of the term (Per Lord Loughborough, in *Parker v. Wells*, Cooke, 58). If a man purchase goods for his own use, that will not make him a trader, even though he afterwards sell such of them as he may not have occasion for; because he does not seek his living by the buying and selling (see dictum of Lord Mansfield in *Wells v. Parker*, 1 T. R. 34; and see *Summersett v. Jarvis*, 3 Brod. & Bing. 2; 6 Moore 56). If a man buy horses to sell again with a view to profit, he is a trader; but if he sell only such as he bred and reared himself, he is not (*Ex parte Gibbs*, 2 Rose, 38; *Wright v. Bird*, 1 Price, 20). So if a fisherman purchase fish and sell them he is a trader, but if he sell only such fish as have been caught by him he is not (*Heaney v. Birch*, 3 Camp. 233). If a man made bricks from his own land, as a mode of enjoying the profits of it, even although he made the bricks entirely for sale, and purchased sand and fuel, &c., for the purpose of making them, he was held not to be a trader (*Wells v. Parker*, *ubi supra*; Cooke, 52–63; *Sutton v. Weely*, 7 East, 442). When a man purchases standing timber to sell again, with a view to profit, he has been held a trader; but if he sells only such as he cuts down upon his own land it would be otherwise (*Holroyd v. Gwynne*, 2 Taunt. 176). If the owner of an estate, with a view to its improvement build houses, and afterwards happen to sell or let them, he cannot be called a trader (*Ex parte Neirincks*, 2 Mon. & A., 384).

It has been held necessary, in order to make a man bankrupt as a trader by buying and selling that there should have been a repeated practice of it; for a single act of buying and selling unaccompanied by an intention to continue it, is not sufficient (Cooke, 64; *Ex parte Blackmore*, 6 Ves. 3; *Ex parte Boves*, 4 Ves. 168; *Hankey v. Jones*, Cowp. 748; and see *Bolton v. Sowerby*, 11 East 274; *Ex parte Duffaur*, 21 L. J. Bank. 38.). But if this intention exist, the extent of the trading, whether large or trifling, prior to the bankruptcy, will be immaterial (*Patman v. Vaughan*, 1 T. R. 572; *Bartholomew v. Sherwood*, 1 T. R. 573). A mere trifling buying and selling, quite collateral to a man's line of life, even though it yield him a profit, will not render him a trader; as, for instance, a schoolmaster who buys books, &c., and sells them to his scholars (*Valentine v. Vaughan*, 1 Peake, 108; *Newton v. Trigg*, 1 Salk., 109).

The legality or illegality of the buying or selling, makes no difference; it has been held that a trader may become bankrupt, although he has not taken out a license necessary to legalize his trade (*Sanderson v. Rowles*, 4 Burr. 2066; *Martin v. Nightingale*, 11 Moore, 305). Even a smuggler might become bankrupt (*Ex parte Meymot*, 1 Atk. 199; *Cobb v. Symonds*, 1 D. & R., 111).

A trading to be within the bankrupt laws must be a substantive and independent trading; there must be a general intention to trade; and, a trading as a means of gaining a livelihood (*Paul v. Dowling*, 1 Moo. & M. 263; *Heane v. Rogers*, 9 B. & C. 578; *Ex parte Burgess*, 2 G. & J. 183; and cases cited at 1 Doria & Macrae, 100, ed. 1863). The editor and proprietor of a newspaper is a trader within the bankrupt laws; so is a publisher who buys the whole daily impression of a paper to resell at a profit (1 D. & M. 102). A surgeon who confines the sale of his drugs to his patients is not a trader (*Ex parte Daubeny*, 3 M. & A. 16; *Nicholson v. Cooper*, 31 L. T. Rep. 184, Ex.); nor is a farmer, who makes cider from his orchard, though he purchases apples yearly from his neighbours to make up his supply (*Ex parte Gallimore*, 2 Rose, 427).

Every one who buys and sells, unless it be the mode by which a living is sought, is not a trader; nor is a mercantile act, although resulting in a profit, alone sufficient to constitute a trading (*Newland v. Bell*, 1 Holt, 221; *Ex parte Atkinson*, 1 M. D. & DeG. 300). A practising barrister prepares periodically a series of legal reports, and a digest, paying for professional assistance to enable him to complete the manuscripts. He buys paper, pays for the printing of his work upon it, and sends it to a publisher for sale upon commission. Yet he is held not to be a trader within the meaning of the bankruptcy laws (*Re L. 7 C. C. Chron.* 87; and see *Re Hare*, L. T. Rep. 15; *Ex parte Hammond*, 1 DeGex, 93; *Stuart v. Sloper*, 3 Exch. Rep. 700).

In order to be brought within the scope of the Act, and obtain a discharge from indebtedness, there will exist a temptation for non-traders to assume the rôle of traders. This kind of trading will not support bankruptcy (*Ex parte Dart*, 2 D. & C. 543; *Ex parte Hall*, M. & C. 445, 479).

The lessee of a quarry who digs rock, and works it up into slate for sale, is not thereby made a trader within the meaning of the bankrupt laws, nor is he so made a trader by selling tools and gunpowder to his workmen, nor by letting a builder have iron and timber to be used in buildings on the quarry. Dealing in shares in joint stock companies does not constitute a man a trader (*In re Cleland*, 2 L. R. Chy. 466).

An infant cannot trade, because his contracts made for goods for the purpose of trade are absolutely void (*Thornton v. Illingworth*, 2 B. & C. 824); and it is well settled by a long series of decisions that he is not liable to the bankruptcy laws (*Ex parte Adam*, 1 V. & B. 493; *O'Brien v. Currie*, 3 Car. & P. 283; Lord Raymond's Rep. 443; *Ex parte Watson*, 16 Ves. 265).

The criterion of a *fême covert* being capable of falling under the bankrupt laws appears to be her liability to be sued to execution for the debts she has contracted during coverture. If a married woman is so circumstanced as to be subject to a common law execution, there does not seem to be any reason why she should not likewise be subject to this statutory execution (*Ex parte Preston*, Green 8; Cooke's B. L. 40; *Ex parte Carrington*, 1 Atk. 206; *Lavie v. Phillips*, 3 Burr, 1776; *Ex parte Mear*, 2 B. C. C. 266).

It is doubtful if our Act respecting the separate property of married women (Con. Stats. U. C. c. 73), will affect the application of this Act to that

class of persons. For although, under the provisions of that statute, a married woman possesses entire control over her property, which is liable to execution for her torts, there is nothing to show that it is liable to execution at law for her contracts made during coverture. The separate estate may, of course, be reached in equity; but whether that would render it liable to attachment in bankruptcy proceedings is very questionable. It is probable, however, that a woman, who has obtained an order protecting her earnings under the above mentioned Act, may become bankrupt as to that portion of her estate.

A lunatic may be a bankrupt, provided the act of bankruptcy be committed during a lucid interval (*Ex parte Priddey*, Cooke, 48; *Anon*, 13 Ves. 590; *Ex parte Stamp*, 1 DeG. 345).

A man once a trader is liable to the bankruptcy laws until all his debts are paid, whether contracted during the period of his trading (*Ex parte Dewdney*, 15 Ves. 495; *Ex parte Bamford*, 15 Ves. 458; *Doe v. Lawrence*, 2 Car. & P. 134), or incurred before that time, and in no way connected with his trading (*Baillie v. Grant*, 9 Bing. 121; 2 M. & Sc. 193; 6 Bligh, 459, appealed to the House of Lords).

It is a question whether the limit of three months after an act of bankruptcy, that has been laid down as the time within which proceedings must be commenced (see below, sec. 18), can be held to apply to the case of a trader ceasing to meet his commercial liabilities generally as they become due. From the moment a trader ceases to meet his liabilities when due, he would seem to be committing a continuing act of bankruptcy, that is not removed until either the debts are paid, or barred by the Statutes of Limitations.

It is enacted below (sec. 143) that "all the provisions of this Act respecting traders, shall be held to apply equally to unincorporated trading companies and copartnerships; and the chief office or place of business of such unincorporated trading companies and copartnerships shall be their domicile for the purposes of this Act."

A trader who has ceased to trade before 1st September, 1864, cannot be proceeded against under this Act. But it is not necessary for the plaintiff expressly to state in his affidavits for the attachment that the defendant was a trader since the Act came into force (*Bagwell v. Hamilton*, 10 U. C. L. J. 305).

OF VOLUNTARY ASSIGNMENTS.

2. Any debtor unable to meet his engagements, and desirous of making an assignment of his estate, and any debtor who is required to make an assignment, as hereinafter provided, shall make an assignment of his estate and effects to any official assignee resident within the county or place wherein the Insolvent has his domicile; or if there be no official assignee therein then to an official assignee in the County or place nearest to the domicile of the Insolvent wherein an official

Assignment to be made to Interim Assignee.

assignee has been appointed, and the official assignee to whom such assignment is made shall be known as the Interim Assignee: and forthwith upon the execution of the deed of assignment to him, a meeting of the creditors of the Insolvent for the appointment of an assignee, shall be called by the interim assignee to be held at the place of business of the Insolvent within a period not exceeding three weeks from the execution of the deed of assignment.

Meeting of
creditors to
be called.

Under the Act of 1864 (s. 2, s. s. 1), a person desiring to make a voluntary assignment had, as a preliminary step, to call a meeting of his creditors, and give them an opportunity of selecting the assignee. This necessitated a notice of at least two weeks, during which time the debtor, although a self-declared insolvent, had absolute possession and control of his estate. This was felt to be a dangerous power to entrust to insolvents, and the amending Act of 1865 (sec. 2), put forward an inducement to the debtor to make an immediate assignment, by giving him an option of assigning to any official assignee without the formality of calling the meeting of creditors,—not, however, prohibiting the calling of the meeting. By this, and the following sections, it is now rendered obligatory to make an immediate assignment to an interim assignee, to whom, and not to the insolvent, is committed the duty of calling the meeting of creditors, and of preparing the statements to be submitted on that occasion. In the hands of the creditors the selection of the permanent assignee is ultimately made to rest (see below sec. 5).

The amending Act of 1865, sec. 2, provided that the voluntary assignment might be made to "*any* official assignee," but the Courts have decided that it could only be validly made thereunder to an official assignee, resident within the district or county within which the Insolvent has his place of business, (*White v. Outhbertson*, 17 C. P., U. C., 377; *Hingston v. Campbell*, 2 L. J., U. C. (N. S.) 299; *McWhirter v. Learmouth*, 18 C. P. U. C. 136.) Yet the legislature now declare (below sec. 141) those words to have meant, and to mean, any official assignee whatever, and that they are to be construed as if they were followed by the words "resident or appointed, in any part of the Province of Canada." By the present Act, however, the assignee in the case of a voluntary assignment, must be a resident in the Insolvent's county. An assignment under this clause is not valid unless accepted by the assignee (*Yarrington v. Lyon*, 12 Grant 308).

Under the provisions of this clause there could have been little doubt, even in the absence of the decisions cited below (*Re Brett*, and *Re Thomas*), that any person unable to meet his engagements might become bankrupt without producing assets. In England, until the Act of 1861, it was otherwise. Under the Act of 1849 it was necessary for a trader, on petitioning for adjudication of bankruptcy against himself, to make it appear to the satisfaction of the court that his available estate was sufficient to pay his creditors at least five shillings in the pound, clear of all charges of prosecuting bankruptcy. This was modified in the Act of 1854 to the extent of allowing adjudication of bankruptcy on petition of a trader who could make it appear that his available estate was sufficient to produce the sum of £150 at least. It was indeed, held by Commissioner Holroyd, in a case under the recent

English Act, (*Re Newmark*, 6 L. T. (N. S.) 755), that a debtor who petitioned the court without assets was in the situation of a pauper, and should have applied under the provisions of the statute applicable to such cases. As our Act has not provided for applications *in formâ pauperis*, the usual procedure under this section must be used in every case of voluntary assignment. This decision, however, has not passed unchallenged. In a note to this case the view is taken that the non-possession of assets is no justification for the dismissal of a petition under the Act of 1861. The writer contends that as the language of the Act is "any debtor may petition," there is no qualification or restriction whatever, as regards the possession of any amount of property, large or small. And he comes to the conclusion that, however the non-possession of property may be an ingredient in arriving at a judgment upon the merits, it has nothing whatever to do with any question as to the jurisdiction of the Court, or the *locus standi* of a petitioner. The writer of an able article on "The New Bankrupt Law," in the *Law Times* of the 9th August, 1862, holds the same opinion, which is one that seems very much in accordance with the spirit of modern legislation upon the subject. The legislature and courts are now not hesitating to declare that the relief of the honest debtor is the primary, and the possession of his estate by his creditors the secondary aim of the bankruptcy laws. And see *Ex parte Morrison*, 10 Jur. (N. S.) 787, in which case it seems to be taken for granted that assets are not required; and also *Ex parte Mitchell*, 1 DeG., 257.

On an appeal from an order of a Commissioner in bankruptcy, Lord Justice Turner pronounced a dictum which goes far to strengthen the argument for the application of our voluntary assignment clauses to cases where there are no assets. He is reported to have said, "I doubt whether in any case (where there is no fraud) a petition ought to be dismissed having regard to the new Act, which extends to all debtors, whether traders or not."

If an insolvent very shortly before he applies under the voluntary assignment clauses dispose of all his property for the purpose, among other things, of defraying the expenses of his solicitor in passing him through the court, and thereby leave nothing whatever for his creditors, his application may be refused (*Re Dufaur*, 6 L. T. (N.S.) 195; *Re Wilson*, 6 L. T. (N.S.) 258). The fraud upon creditors in using the assets to fee a solicitor, instead of bringing them in, seems to be the ground of these decisions.

The question of the necessity for producing assets was raised, but not decided in *Re Smith*, 4 Prac. & Chr. Rep. U. C., 91. It was contended, on the one side, that because the preamble of the Act of 1864 recites that it is expedient to make provision for the settlement of the "estates" of insolvent debtors, where there is no estate there could be no jurisdiction. On the other side, it was said, that the first section extended the application of the Act to "all persons." In *Re Brett* (*unreported*), on the application for a discharge, the late Judge Harrison, County Court Judge for York and Peel, decided that the absence of assets was, in itself, no bar to obtaining a discharge. The point now seems to be authoritatively decided by the Chancellor in a very recent case (*Re Thomas*, 15 Grant, 196). This was an appeal from an order of a County Court Judge, absolutely refusing to grant a discharge on two grounds, one of which was, that the insolvent had no estate. Vankoughnet, C. thought the County Court Judge wrong in the reasons assigned for refusing the certificate, and says;—"The want of assets does not appear to me to be, in itself, a sufficient reason for refusing the discharge."

3. Such meeting shall be called by advertisement (Form A), and previous to such meeting the interim assignee shall prepare, and shall then exhibit, statements showing the position of the affairs of the Insolvent, and particularly a schedule (Form B), containing the names and residence of all his creditors, and the amount due to each, distinguishing between those amounts which are then actually overdue, or for which he is directly liable, and those for which he is only liable indirectly as indorser, surety or otherwise, and which have not become due at the date of such meeting, the particulars of any negotiable paper bearing his name, the holders of which the interim assignee shall be unable to ascertain, the amount due to each creditor, and also any contingent liabilities, describing the same; and a statement showing the amount and nature of all the assets of the Insolvent, including an inventory of his estate and effects; and the insolvent shall assist in the preparation of such statements and of the said schedule, and shall attend at such meeting for the purpose of being examined on oath touching the contents thereof, and touching his books of account and his estate and effects generally: And at such meeting he shall file a declaration under oath stating whether or no such statements and schedule are correct, and if incorrect, in what particulars. And the interim assignee shall also produce at such meeting, the Insolvent's books of account, and all other documents and vouchers, if required so to do by any creditor.

Calling of meeting and proceedings thereat.

Schedule of liability and assets, and what it must contain.

Insolvent to assist, and make a declaration on oath.

For the manner of publishing the advertisement mentioned in this section, and the number of insertions that will be necessary, see below sec. 117.

The principal change from the old law that occurs here, is the rendering the interim assignee (who must be an official assignee), responsible for the preparation of the statements and schedule, instead of the insolvent alone. The insolvent must assist in the preparation of the statement, and if he willfully or with intent to defraud, omit any of his effects, he will fall under the provisions of sec. 147 (below), and be guilty of a misdemeanor.

Notice to each creditor; what to contain.

4. At least ten days before the day fixed for such meeting the interim assignee shall mail to each of the creditors of the Insolvent, in so far as he shall then have been able to discover them, a notice of such meeting with a list containing the names of all creditors holding direct claims and also of all creditors holding indirect claims maturing before the meeting, amounting to one hundred dollars each, with the amount appearing to be due to each of them; and the aggregate amount of those under one hundred dollars.

By sec. 2, *supra*, the interim assignee must forthwith call the meeting of creditors. The 117th sec. requires only two weeks notice of the meeting, so that the assignee must be prompt in preparing and mailing the lists of creditors, since he has only about four days to do it in.

Appointment of Assignee.

Irregularity not to vitiate it.

5. At such meeting, the creditors who have proved their claims, in the manner hereinafter provided by the one hundred and twenty-second section, may appoint an assignee to the estate of the Insolvent. And no neglect or irregularity in any of the proceedings antecedent to the appointment of an assignee shall vitiate such appointment, whether it be made under a voluntary assignment, or in compulsory liquidation.

As to the mode of voting for the appointment of an assignee, see below sec. 118.

The assignee, whom the creditors are empowered to nominate under this section, may be resident out of the county within which the insolvent has his place of business, and he need be neither a creditor nor an official assignee.

At a meeting of creditors held for the purpose of giving their advice upon the appointment of an official assignee of a partnership estate, it was held that the creditors of the individual partners, as well as the creditors of the firm, had the right to vote in the choice of an assignee (*Luxton v. Hamilton & Davis*, 10 L. J., U. C. 334).

At the first meeting of creditors to choose an assignee, it has been considered necessary to entitle the representative of a creditor to vote, that he should be appointed under a duly authenticated letter of attorney (*Re John Campbell*, 1 L. J. U. C. (N. S.), 135).

Although no neglect or irregularity in any of the proceedings antecedent to the appointment of an assignee shall vitiate the subsequent assignment, it will probably be held that an omission of any such proceedings would render the assignment one made "otherwise than in the manner prescribed by this Act," and an act of bankruptcy upon which proceedings in compulsory liquidation might be taken by a creditor.

6. If no assignee be appointed at such meeting, or at any adjournment thereof; or if the assignee named refuses to act; or if no creditor attends at such meeting, the interim assignee shall be the assignee to the estate of the Insolvent, but if any assignee be appointed thereat, he shall thenceforth be the assignee of such estate, and the interim assignee shall immediately deliver over to him the whole of the estate of the Insolvent, and all statements, documents and papers prepared by such interim assignee, and unless he is himself appointed assignee, shall also immediately execute a deed of transfer to such assignee of the estate and effects of the Insolvent.

In case no Assignee is appointed, Interim Assignee to act, &c., otherwise to deliver estate to Assignee.

Under the law as it stood before in default of an appointment by the creditors, the insolvent might select an assignee from among his creditors, with some restrictions as to the choice, or might assign to an official assignee resident within the district or county, within which the insolvent had his place of business.

7. The deed or instrument of assignment may be in the form C., and the deed of transfer by the interim assignee in the form D., or in any other forms equivalent thereto respectively, and if executed in any part of Canada other than the Province of Quebec, they shall be in duplicate, and a copy of the list of creditors produced at the first meeting of creditors shall be appended to the deed; and no particular description or detail of the property or effects assigned need be inserted in either of such deeds; and any number of counterparts of such deeds required by the assignee, and any further or other deeds or assurances required by the assignee, shall be executed by the Insolvent or by the interim assignee, as the case may be, at the request of the assignee, either at the time of the execution of such deed or instrument, or afterwards, to which counterparts no list of creditors need be appended.

Form of instrument of assignment, and of deed of transfer by Interim Assignee.

It was decided under the Acts of 1864 and 1865, that although the latter enactment permitted a voluntary assignment to an official assignee, without

the insolvent being required to call a meeting of creditors, or to exhibit to them a schedule at the meeting, yet the list of creditors must be annexed to the voluntary assignment. It would seem to be impossible to append to the deed of assignment, as directed by this clause, the list of creditors at the time of its execution, for the preparation of this list is (sec. 3. *ante*) now entrusted to the interim assignee, whose appointment is made by the deed of assignment itself. It is also to be noticed that the form of voluntary assignment C. omits the reference contained, even after the Act of 1865, to an annexed list of creditors (See *King v. Smith*, 19 C. P. U. C. 319). The list should, however, be appended at the earliest moment after its completion.

If Interim
Assignee fail
to execute
deed of
transfer.

8. If the interim assignee shall fail or neglect to execute such deed of transfer within twenty-four hours after the nomination of an assignee at such meeting—he shall in the discretion of the Judge be subject to imprisonment for a period not exceeding one month; and such imprisonment may be ordered by the Judge upon the application of the person so nominated as assignee, or of any creditor, supported by affidavit to the satisfaction of the Judge; and the interim assignee shall not be permitted to plead to or answer such application either as to its form or upon the merits in any manner or way whatever until after he shall have executed and delivered to the assignee such deed of transfer, and shall have also delivered over to him the whole of the estate and effects of the Insolvent—with all books, instruments, vouchers and documents appertaining thereto.

This provision for punishment in case the interim assignee does not make a prompt transfer to the creditors' assignee is new, because the occasion for it did not exist before. It is difficult to see why the same penalty was not attached to delay on the part of the guardian, in cases of compulsory liquidation, to make the transfer provided for below, section 29.

Proceedings
when
Interim
Assignee
becomes the
Assignee.

9. If by election or by failure of election, the interim assignee shall become assignee, his appointment shall be established, if by election by an instrument (Form D D) declaring the fact, signed by the chairman and by one or more of the creditors present at the meeting appointing him, and authenticated by his own affidavit: and if by failure of election, by an instru-

ment declaring the fact, and signed and sworn to by himself before the Judge, who shall have power to interrogate him specially upon the contents thereof, and, shall not receive his oath if he has any reason to doubt the facts stated in such instrument; and the instrument of appointment shall be deposited in the office of the Court with the deed of assignment; and a copy of such instrument certified by the clerk or Prothonotary of the Court wherein it is deposited under the seal of such Court, shall serve all the purposes of the deed of transfer hereinbefore provided for and for that purpose shall be annexed to the deed of assignment or in the Province of Quebec to the copy thereof and registered therewith.

Deposit of the instrument: copies, how certified.

This section relates to the office of interim assignee, and is entirely new.

10. The assignment shall be held to convey and vest in the interim assignee in the first instance, the books of account of the Insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable papers, stocks, bonds, and other securities, as well as all the real estate of the Insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and moveable and immoveable property, debts, assets and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided; and if an assignee be subsequently appointed, or if by the failure of election, the interim assignee becomes assignee, such assignee shall have the same rights in and to the whole of such estate and effects as were previously held under this Act by the interim assignee; Provided always that no pledgee of any of the effects of the insolvent or any other party in possession there-

What the Assignment shall be held to convey.

proviso; as to pledgee of the property of the Insolvent.

of with a lien thereon, shall be deprived of the possession thereof, without payment of the amount legally chargeable as a preferential claim upon such effects; except in the case hereinafter provided for of such pledgee or party in possession proving his claim against the estate and putting a value upon his security; But at any time before the maturity of any advance made upon the pledge of effects of the insolvent, or within fifteen days thereafter, the assignee shall have the right to sell such effects as he may sell the other effects of the insolvent; and thereupon if the price is sufficient to cover such advance with interest and lawful charges, the pledgee shall carry out such sale and deliver the effects sold in conformity therewith receiving the price thereof, but not otherwise.

The general rule as to the effect of the appointment of assignees is, that all property of the bankrupt, real and personal, in possession, remainder, reversion, or in action merely (see below secs. 42 and 43 of this Act), to which he was entitled at the date of the act of bankruptcy, or at any time before his discharge under this Act, is vested in the assignees by virtue of their appointment; and his acts thenceforth, with reference to this property, are considered to all intents and purposes as those of a stranger. To this section and this rule there is an important exception made by the 40th section of this Act, where it is provided that "no power vested in the insolvent, or property or effects held by him as trustee, or otherwise, for the benefit of others, shall vest in the assignee under this Act."

Property which has been placed in the hands of a man for a specific purpose will not pass to his assignee upon his bankruptcy. As where bills of exchange were remitted to bankers in London with permission to discount them for a particular purpose, and they were not in fact discounted before the bankruptcy of the banker to whom they were remitted, they were ordered to be delivered up to the assignees (*Ex parte Freere*, Mon. and McA., 262). Also, where a bankrupt was allowed by his assignees to remain in possession of his house and furniture, in order to assist in settling the affairs of the bankrupt estate, and the bankrupt traded and became bankrupt a second time, it was holden that the furniture, &c., still remained the property of the assignees, under the first commission, and did not pass under the second assignment (*Walker v. Burnell*, Doug. 317, and see *Mullen v. Moss*, 1 M. & S., 325).

A bequest to a bankrupt, if he should obtain his certificate, passes to his assignees (*Davidson v. Chalmers*; *Perry v. Chalmers*, 10 L. T. (N.S.) 217).

Where after a deed of assignment for benefit of creditors by two partners one becomes bankrupt, the trustees under the deed are entitled only to the joint estate of the debtors, and not to the separate estate of either debtor (*Re Lowden's Settlement*, 10 L. T. (N.S.) 261).

Although all the property acquired by a bankrupt up to the time of his discharge passes to his assignees, as well as the right of action respecting it (see below secs. 42 and 43), he may maintain an action for his personal labour, performed after the issuing of the writ of attachment (*Chippendale v. Tomlinson*, Cook, 428; *Silk v. Osborne*, 1 Esp. 140; and see *Williams v. Chambers*, 11 Jur. 798); and he may maintain an action with relation to after-acquired property (*Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 44; *Evans v. Brown*, 1 Esp., 170; *Leroche v. Wakeman*, Peake, 190), or sue upon a contract made with him (*Cumming v. Roebuck*, Holt, 172), unless the assignees interfere (*Kitchen v. Bartsch*, 7 East., 53; *Herbert v. Sayer*, 2 Dow. & L. 49).

Where the assignees and creditors of a bankrupt, who has not obtained his discharge, allow him to trade or contract debts without their interference or claim, it falls within the principle of a man having a lien standing by and allowing another to take a new security, whereby he is postponed; and the subsequent creditors of the bankrupt will be preferred to the creditors under the bankruptcy (*Troughton v. Gitley*, Amb. 630; and see *Tucker v. Hernahan*, 17 Jur., 723).

All property which an insolvent becomes entitled to up to the time of his discharge passes to the assignee, but it must not be supposed that the insolvent is discharged from any debts he may incur after the voluntary assignment or the issue of the writ.

It is probable that the option to take a lease would pass to the assignee under this clause, and might be sold by him and assigned to the purchaser, unless the lease is to contain a proviso against alienation. See *Buckland v. Papillon*, 1 L. R. Eq. 477.

A legatee entitled under a will to such share as testator's widow should appoint, and in default to one-fifth of a moiety, by a deed under the Bankruptcy Act, 1861, assigned all his "estate and effects" to trustees for creditors. The widow having subsequently appointed to the legatee the same share he would have taken in default of appointment, it was held that the appointed share did not pass to the trustees under the deed of assignment (*In re Vizard's Trusts*, 1 L. R. Eq. 667, following *Lee v. Olding*, 2 Jur. (N.S.) 850).

The assignment will not displace a solicitor's lien for costs, or entitle the assignee to possession of the papers. Where a partner of a trading firm, which had become bankrupt, was also one of the firm of solicitors whom the trading firm had employed in the conduct of suits which were pending at the time of bankruptcy, and the assignees in bankruptcy had retained other solicitors, it was held that the assignees in bankruptcy were not entitled to an order for a delivery up to the assignees of the papers in the solicitor's possession, subject to their existing lien (*in re Moss*, 2 L. R. Eq. 345). A payment made by an insolvent, after the issue of a writ of attachment against him, on account of a draft discounted by bankers for him, and which was dishonoured by non-acceptance, is recoverable back by the official assignee, though the bankers were ignorant of the insolvency when they received the money from him (*Roe v. Royal Canadian Bank*, 19 C. P. U. C. 347). And see also notes and cases collected below, following section 29.

By 23 Vic. cap. 25, the exemption clauses in the Con. Stats. U. C. (cap. 19, sec. 151 and cap. 22, sec. 254), are repealed, and the following provisions substituted:—

"The following chattels are hereby declared exempt from seizure under any writ issued out of any court whatever in this Province, namely :

"1. The bed, bedding, and bedsteads in ordinary use by the debtor and his family ;

"2. The necessary and ordinary wearing apparel of the debtor and his family ;

"3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and sieves as are in common use ;

"4. All necessary fuel, meat, fish, flour, and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of forty dollars ;

"5. One cow, four sheep, two hogs, and food therefor for thirty days ;

"6. Tools or implements of, or chattels ordinarily used in, the debtor's occupation to the value of sixty dollars."

Deposit of
duplicate of
deed of
assignment.

11. Forthwith upon the execution of the deed of transfer, the assignee, if appointed in any part of Canada other than the Province of Quebec, shall deposit one of the duplicates of the deed of assignment and of such deed of transfer, and if in the Province of Quebec, authentic copies of each, in the office of the proper Court ; and in either case the list of creditors shall accompany the instruments so deposited.

The office of the Clerk of the County Court of the county, in which the meeting of creditors is held, is the proper place for filing the duplicate deed of assignment.

Registration
of Deeds of
Assignment
and of
transfer.

12. If the Insolvent possesses real estate, the deed of assignment with the deed of transfer annexed thereto, if any such deed of transfer be required and executed, or, if such real estate be in the Province of Quebec, authentic copies thereof, may be enregistered in the Registry Office for the Registration Division or County within which such real estate is situate ; and no subsequent registration of any deed or instrument of any kind executed by the Insolvent, or which other-

wise would have affected his real estate, shall have any force or effect thereon; and if the real estate be in any part of Canada other than the Province of Quebec, and deeds of assignment and of transfer be executed in the Province of Quebec before Notaries, copies of such deeds certified by the Notary or other public officer in whose custody the originals remain, may be registered without other evidence of the execution thereof, and without any memorial; and a certificate of such registration may be endorsed upon like copies, and if the property be in the Province of Quebec and the deeds of assignment and of transfer be executed elsewhere in the Dominion, they may be enregistered at full length in the usual manner; but it shall not be necessary to enregister, or to refer on registration in any manner to, the list of creditors annexed to the deed of transfer.

There would seem to be some very difficult questions likely to arise as to the registration of deeds of assignment under this clause. As "no particular description or detail of the property or effects assigned need be inserted in either of such deeds" (see above sec. 7), it is not easy to perceive that much will be gained by making a search to ascertain if such a deed is registered against a particular lot of land. However, as by sec. 81 of the Registry Act of 1868, the Registrar is required to keep an alphabetical index exhibiting the names of the different grantors, this would enable any person investigating a title to find out whether the apparent owner had incumbered it by a deed of assignment under this Act.

COMPULSORY LIQUIDATION.

13. A debtor shall be deemed insolvent and his estate shall become subject to compulsory liquidation:

When a debtor's estate shall be subject to compulsory liquidation.

a. If he absconds or is immediately about to abscond from any Province in Canada with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process; or if being out of any such Province in Canada he so remains with a like intent; or if he conceals himself within the limits of Canada with a like intent.

Debtor absconding.

It is held that a person going abroad for a legitimate purpose, and remaining abroad without making any provision for the payment of his debts, or sending money for that purpose, is remaining abroad with intent to delay his creditors; although he constantly stated in his letters his intention to come home in a month or six weeks, but fixed no definite time (*Ex parte Cohn*, 2 L. T. (N.S.) 90, Bank).

See also note to section 18 below, as to effect upon this act of bankruptcy of the limitation of three months for commencement of proceedings.

If the intent to delay creditors can be proved, either in the departure from the country, or in the remaining abroad, or can be inferred as the necessary and foreseen consequence of the delay actually produced, an act of bankruptcy will be proved (Eden's B. L. 16). A petition cannot be sustained by proof of residence abroad where the departure was for a fair and proper purpose, and not with a view of defrauding creditors. But it is otherwise if apprehension of arrest be coupled with a justifiable motive (*Warner v. Barber*, Holt, 175). If a trader, after going abroad in the first instance for a proper object, protract his residence abroad for an unreasonable time, assigning no cause for his absence, and leaving no funds, nor making any arrangements for the payment of his debts, the inference will be that he remains abroad with intent to delay his creditors (*Cumming v. Bailey*, 6 Bing. 370).

Secreting
estate.

b. Or if he secretes or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them;

Fraudulently
assigning it.

c. Or if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of, any of his property with intent to defraud, defeat or delay his creditors, or any of them;

The intention to defraud, defeat or delay creditors, is the main ingredient in the three foregoing acts of bankruptcy. If this intention actually existed at the time the act was committed, it is little matter whether a creditor was thereby defeated or delayed, or not (*Robertson v. Liddle*, 9 East. 487; *Wydown's* case 14 Ves. 86; *Chenowet v. Hay*, 1 M. & S. 676; *Aldridge v. Ireland*, 1 Taunt. 273; *Colkett v. Freeman*, 2 T. R. 59). On the other hand a creditor being in fact delayed by the act, is not of itself evidence of the debtor's intention in committing it (*Ex parte Osborne*, 2 Ves. & B. 177; *Fowler v. Padget*, 7 T. R. 509). The intent can only be evidenced by the debtor's acts or admissions. If a man admit that he committed the act with such an intent, it is almost conclusive evidence of it, and can scarcely be explained away (see *Rawson v. Haigh*, 2 Bing. 99). Anything said or written by the bankrupt before his bankruptcy, tending to show the intent of an act equivocal in itself, is admissible (*Smith v. Cramer*, 1 Scott, 541; *Scott v. Thomas*, 6 Car. & P. 611. If the necessary consequence of the debtor's act be that his creditors must be thereby defrauded, defeated or delayed, this is presumptive evidence of his intention to do so (*Ramsbottom v. Lewis*, 1 Camp. 279; *Holroyd v. Whitehead*, 3 Camp. 580; *Ex*

parte Kilner, 2 Dea. 325; 3 Mon. & A. 722). The presumption raised by circumstances attending the act may be rebutted by evidence that the debtor did not at the time entertain the intention imputed to him. For instance, he may prove that upon leaving the country he left a partner behind him (*Ramsbottom v. Lewis, ubi supra*); or that his presence out of the Province was absolutely necessary in order to look after his concerns there (*Ex parte Mutrie*, 5 Ves. 576; *Warner v. Barber*, 1 Holt, 175); or that previous to his departure he made arrangements that the interests of his creditors should be attended to in his absence (*Ramsbottom v. Lewis, ubi supra*: and see *Windham v. Patterson*, 1 Stark. 144).

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within this clause (*Sharp and Secord v. Matthews*, 5 Prac. Rep. U. C. 10).

d. Or if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature proveable under this Act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law.

Or procuring it to be seized in execution.

An act of bankruptcy by procuring goods to be taken in execution is not committed till actual seizure, and when so committed is not carried back by relation to an earlier period (*Belcher v. Gunmow*, 11 Jur. 286; *Gibson v. King*, 1 Car. & M. 458). The mere allowing a judgment to go by default, under which judgment the debtor's goods are taken in execution, is, in itself, no procuring the goods to be taken in execution so as to constitute an act of bankruptcy (*Gibson v. King, ubi supra*).

e. Or if he has been actually imprisoned or upon the gaol limits for more than thirty days in a civil action founded on contract for the sum of two hundred dollars or upwards, and still is so imprisoned or on the limits; or if in case of such imprisonment he has escaped out of prison or from custody or from the limits.

Or being imprisoned in a civil action.

In order to constitute this act of bankruptcy there must be an uninterrupted imprisonment for more than thirty days. If a man arrested be bailed out before the expiration of the thirty days, and afterwards render in discharge of his bail, and remain in custody thereafter, the thirty days will begin to run on the day of the render, and not on the day of the original arrest (*Ex parte Dufrene*, 1 Ves. & B. 51; *Tribe v. Webster*, Willes, 464).

Or refusing
to appear.

f. Or if he wilfully neglects or refuses to appear on any rule or order requiring his appearance, to be examined as to his debts under any statute or law in that behalf;

Or to obey
orders for
payment.

g. Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or of any part of them;

Or any order
for payment
in Chancery.

h. Or if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery or of any of the judges thereof, for payment of money;

Or assigning
or selling
stock, &c.

i. Or if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act; or if being unable to meet his liabilities in full, he makes any sale or conveyance of the whole or the main part of his stock in trade or of his assets, without the consent of his creditors, or without satisfying their claims.

The act of bankruptcy first mentioned in this clause can only be taken advantage of to place an estate in compulsory liquidation within three months after the assignment has been made (see below, sec. 18): and it does not seem probable that creditors would desire to force a man through bankruptcy proceedings, who had recently made an assignment, and could have nothing more for them; unless indeed, they could hope to set the assignment aside as being fraudulent under this act.

The only creditors who will be in a position to take advantage of this act of bankruptcy in order to enforce compulsory liquidation, are those who have not signed and become parties to the deed of assignment for the benefit of creditors. It has been recently decided in England that a creditor who has executed such a deed may not afterwards take advantage of the assignment as an act of bankruptcy whereon to found proceedings against the assignor (*Re a disputed adjudication*, 2 L. T. (N.S.) 90 Bank). If a debtor execute a deed of assignment to trustees for the benefit of creditors he commits an act of bankruptcy although the trustees do not assent thereto, and refuse to execute the deed (*Ex parte Slann*, 6 L. T. (N.S.) 400 Bank).

An assignment intended to be made under the voluntary clauses of this act might, from some entire omission of a prescribed proceeding, be an act of bankruptcy under this paragraph (see above, note to sec. 5).

It has been held in one of the first decisions under the Act of 1864, in Upper Canada, that this clause does not apply to assignments made before the 1st September, 1864 (*Re Hogg*, in County Court, York and Peel).

The latter clause of this sub-section is new, and covers an important ground for placing a trader in bankruptcy. The particular circumstances of each case must have a great influence upon deciding of its validity as well as of its being an act of bankruptcy. The definition here given is so precise, that proof will be simpler than in English cases. It has been held that an assignment by a trader, by way of mortgage of his stock and implements of trade, where such assignment does not include one-half of all his effects, is not *per se* an act of bankruptcy although his business may be stopped thereby (*Young v. Waud*, 8 Exch. Rep. 221).

j. Or if he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the Sheriff or officer for the sale thereof, or for fifteen days after such seizure; subject however to the privileged claim of the seizing creditor for the costs of such execution, and also to his claim for the costs of the judgment, under which such execution has issued, which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the Province in which the execution shall issue.

Or permitting execution to remain unsatisfied.

This clause only varies from sec. 3 of the Amending Act of 1865, in extending the limit from two to four days before the day of sale, within which the execution must be satisfied; and fixing a limit of fifteen days after the seizure for the same purpose.

14. If a debtor ceases to meet his liabilities generally as they become due, any one or more claimants upon him for sums exceeding in the aggregate five hundred dollars, may make a demand upon him either personally within the county or judicial district wherein such Insolvent has his chief place of business or at his domicile, upon some grown person of his family, or in his employ (Form E): requiring him to make an assignment of his estate and effects for the benefit of his creditors.

If a debtor fails to meet liabilities.

Heretofore it required two creditors to join in making this demand; and no mode of serving the demand was pointed out by the former acts. A trader having ceased to meet his liabilities, a demand was served on him on

the 31st January, requiring him to make an assignment. On February, 6th (the 5th being a Sunday), an order was granted for an attachment, which issued. One of the affidavits filed on application for the attachment was sworn to on February 4th. On an application to set aside the writ and all proceedings for irregularity, it was considered:—

1. That the order for the issuing of the writ was not made too soon.

2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sec. 3, sub-sec. 3, Insolvent Act of 1864, or for making an assignment in accordance with the demand.

3. That the writ of attachment should have been endorsed with a statement that the same was issued by order of the Judge of the County Court; but an amendment was allowed on payment of costs by plaintiffs.—(*McInnes v. Brook*, 1 L. J. U. C. (N. S.) 162.)

But if claims do not amount to \$500, &c., Judge may make an order suspending proceedings.

15. If the debtor on whom such demand is made, contends that the same was made in conformity with this Act, or that the claims of such creditor or creditors do not amount to five hundred dollars, or that they were procured in whole or in part for the purpose of enabling such creditor or creditors to take proceedings under this Act, or that the stoppage of payment by such debtor was only temporary, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities, he may after notice to such claimant or claimants, but only within five days from such demand, present a petition to the judge praying that no further proceedings under this Act may be taken upon such demand, and after hearing the parties and such evidence as may be adduced before him, the judge may grant the prayer of his petition, and thereafter such demand shall have no force or effect whatever; and such petition may be granted with or without costs against either party; but if it appears to the judge that such demand has been made without reasonable grounds, and merely as a means of enforcing payment under color of proceeding under this Act, he may condemn the creditors making it, to pay treble costs.

This section is the same as sec. 3, sub-sec. 3, of the Act of 1864, with the additional provision that the debtor must notify the claimant of his application to the judge.

A perfectly solvent person may, no doubt, be very much injured in his business and reputation by malicious creditors making a demand upon him under these clauses. It is true that he may deny the allegations in the demand by a petition, and bring evidence before the court to prove the unfounded nature of the demand. Yet, all that the judge is empowered to do, should the petition be substantiated, is to condemn the creditors to pay treble costs. In the English Acts the Court is authorized to award satisfaction for the damages sustained by a malicious or unfounded petition being filed. It is presumed that the fact of a judge awarding treble costs against the creditors would not prevent their being rendered liable in an action of damages for maliciously abusing the provisions of the Act. Before the trader could bring such action, it is submitted that he would have to present his petition against further proceeding on the demand, and have the same stayed.

One great hardship upon an honest debtor might be occasioned by these demands, inasmuch as he might in many instances have to disclose in his petition, and before action brought, the nature of defences which he may intend afterwards to set up against the claims which he has failed to settle.

16. If at the time of such demand the debtor was absent from the Province wherein such service was made, application may be made after due notice to the claimants, within the said period of five days to the Judge on his behalf, for an enlargement of the time for making an assignment; and thereupon if such debtor have not returned to such Province the Judge may make an order enlarging such period and fixing the delay within which such assignment shall be made; but such enlargement of time may be refused by the Judge if it be made to appear to his satisfaction that the same would be prejudicial to the interests of the creditors.

If the debtor be absent when the demand is made.

This section is new, and becomes necessary from the provision, in section 14 (ante), for other than personal service of the demand.

17. If such petition be rejected, or if while such petition is pending, the debtor continues his trade, or proceeds with the realization of his assets, or if no such petition be presented within the aforesaid time, and the Insolvent during the same time neglects to make an assignment of his estate and effects for the benefit of his creditors as provided by the second sec-

In certain cases such debtor's estate to become subject to compulsory liquidation.

tion of this Act, his estate shall become subject to compulsory liquidation.

It has been held that an Act of Bankruptcy concerted between the bankrupt and the applying creditor would not support a fiat (*Ex parte Gouthwatte*, 1 Rose, 87; *Ex parte Brooks*, 1 Buck, 257; *Bamford v. Baron*, 2 T. R., 594 n.; *Eyre v. Birbeck*, 2 T. R., 595 n.). But a creditor not privy to such concerted act might avail himself of it (*Ex parte Bourne*, 16 Ves. 145). The bankrupt's agreeing to an act of bankruptcy at the suggestion of a friend, without any concert with the creditor, was held to be no objection to the adjudication (*Roberts v. Teasdale*, Peake, N. P., 27; *Simpson v. Sikes*, 6 M. & S., 295). Although these decisions were rendered nugatory in England by the provisions of 12 & 13 Vic., c. 106, it is presumed that they will be followed in our practice.

When act or omission shall not justify the placing of the estate in compulsory liquidation.

18. But no act or omission shall justify any proceeding to place the estate of an Insolvent in compulsory liquidation, unless proceedings are taken under this Act in respect of the same, within three months next after the act or omission relied upon as subjecting such estate thereto; nor after a writ of attachment in compulsory liquidation has been issued while it remains in force, nor after a voluntary assignment has been made, or an assignee appointed under this Act.

In order to justify proceedings to place an estate in compulsory liquidation, it would seem that the act of bankruptcy relied upon must have been committed during the existence of the debt of the creditor making the application (*Bailie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193). If committed even on the same day that the application is made it will be sufficient (*Ex parte Dufrene*, 1 Ves. & B., 51; *Hopper v. Richmond*, 1 Stark, 507).

Although this section provides that proceedings must be taken within three months after the act or omission relied upon, it should be remarked, that as to the first act of bankruptcy mentioned in section three, it may be a continuing one—*de die in diem*; for any one remaining abroad or concealing himself within the Province with intent to defeat or delay his creditors, commits a continuous act of bankruptcy until he comes back, or discovers himself. It is probable that the acts of negligence in section thirteen, marked *f*, *g*, and *h*, are continuous acts of bankruptcy, as long as the debtor neglects to comply with the rules or orders therein mentioned.

Affidavits in Province of Quebec, how made.

19. In the Province of Quebec an affidavit may be made by a claimant for a sum of not less than two hundred dollars, or by the clerk or other duly authorized agent of such claimant setting forth the particulars of his debt, the insolvency of the person indebted to

him, and any fact or facts which, under this Act, subject the estate of such debtor to compulsory liquidation (Form F).—And upon such affidavit being filed with the Prothonotary of the district within which the Insolvent has his chief place of business, a writ of attachment (Form G) shall issue against the estate and effects of the Insolvent addressed to the sheriff of the district in which such writ issues, requiring such sheriff to seize and attach the estate and effects of the Insolvent, and to summon him to appear before the court to answer the premises; and such writ shall be subject as nearly as can be to the rules of procedure of the court in ordinary suits, as to its issue, service, and return, and as to all proceedings subsequent thereto before any Court or Judge.

Writ of attachment founded thereon.

20. In the Province of Ontario, New Brunswick or Nova Scotia, in case any claimant by affidavit of himself or of any other individual (Form F), shows to the satisfaction of the judge that he is a creditor of the Insolvent for a sum of not less than two hundred dollars, and also shews by the affidavits of two credible persons, such facts and circumstances as satisfy such judge that the debtor is insolvent within the meaning of this Act, and that his estate has become subject to compulsory liquidation, such judge may order the issue of the writ of attachment (Form G) against the estate and effects of the Insolvent, addressed to the sheriff of the county in which such writ issues, requiring such sheriff to seize and attach the estate and effects of the Insolvent and to summon him to appear before the court to answer the premises, and such writ shall be subject as nearly as can be to the rules of procedure of the Court in ordinary suits as to its issue and return, and as to all proceedings subsequent thereto before any Court or Judge.

Affidavits in other Provinces, how made.

Writ of attachment.

By the Act of 1864, it was provided that a declaration should accompany the writ. This was found to be inconvenient and useless in practice, and has been omitted since the Act of 1865.

In an action for maliciously issuing an attachment, the fact of the affidavit of the defendant's agent as to removal of the goods not being corroborated by two witnesses as required by the Act, is not sufficient of itself to support the action (*Eaton v. The Gore Bank*, 27 Q. B. U. C. 490).

This section is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on, as constituting insolvency.

In entitling the affidavits, the names of the plaintiff and defendant should appear in accordance with form F (*Sharp & Secord v. Matthews*, 5 Prac. Rep. U. C. 10). When one petitioning creditor applies and fails to proceed, it is not competent for another creditor to apply for adjudication on that petition (*In re Bristow*, 3 L. R. Chy. 247). A limited company can maintain a petition in bankruptcy for an adjudication, and the secretary of the company can make the necessary oath (*In re Calthorp*, 3 L. R. Chy., 252).

Some doubt may arise as to the nature of the debt of the creditor who can apply under this section. The interpretation clause of the Act of 1864 (sec. 12, sub-sec. 5), gives the meaning of the word "creditor," and says it "shall be held to mean every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety," to which are added, by the interpretation clause of this Act (below sec. 143) the words "and who shall have proved his claim against the estate of an insolvent in the manner provided by this Act." These additional words do not extend the definition of the term "creditor;" they are words of further limitation. It is hardly to be inferred that every debt provable against an estate can be a ground for an application under this section.

It would seem to be a question whether the debt of the applying creditor must not be a debt, for which, if payable at the time, an action at law could be maintained by and in the name of the creditor; and whether an equitable debt is sufficient (*Ex parte Hawthorne*, Mont. 182); although such a debt may certainly be proved under bankruptcy. It has been held that the assignee of a bond could not be an applying creditor within the meaning of the English Act (*Ex parte Lee*, 1 P. W. 782; *Medlicot's case*, 2 Str. 899; *Ex parte Sutton*, 11 Ves. 163). A debt barred by the Statutes of Limitations is insufficient (*Quantrock v. England*, 2 W. Bl. 703; *Ex parte Dewdney*, 15 Ves. 479); so is a debt found upon an illegal consideration (*Wells v. Girling*, 1 Brod. and B. 447). The debt must not be a claim for damages, unless ascertained and fixed by judgment; therefore interest, even on a bill of exchange, cannot be the subject of an applying creditor's debt, unless expressed to be payable upon the face of the instrument, and it cannot be added to the principal to make up the amount required to constitute the creditor's debt (*Cameron v. Smith*, 2 B. & A. 305; *Ex parte Greenway*, Buck. 412; *Ex parte Burgess*, 8 Taun. 660; 2 Moore, 745).

There seems to be no reason why application might not be made for a writ of attachment against a person who has already taken the benefit of our Act for the relief of Insolvent debtors, Con. Stats. U. C., ch. 26. (See *Jellis v. Mountford*, 4 B. & A. 256).

Unascertained damages claimed against an insolvent for a tort cannot be the debt relied on by an applying creditor; nor, on the other hand, does a discharge under this act operate to free a man from any debt due as damages for certain personal wrongs (see below, sec. 100).

Under the Insolvent Acts, a creditor, whose debt is immatured, may commence proceedings against his debtor, who is insolvent, in like manner as

he might have done if his debt had been overdue at the time. But in a case where it appeared that the debtor did not owe more than \$100 beyond the creditor's debt, none of which was at the time due, the Court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent and so not liable to have his estate placed in compulsory liquidation (*In re Moore v. Luce*, 18 C. P. U. C., 446).

The obligation to pay a sum of money under an order of a court of Equity, although placed for some purposes on the same footing as a judgment at law is not a sufficient petitioning creditor's debt (*Ex parte Blencowe*, 1 L. R. Ch., 393).

21. If the defendant in any process for compulsory liquidation, has no domicile in any Province of Canada, or absconds from the Province in which he has his domicile or remains without such Province, or conceals himself within such Province, service of the Writ of Attachment issued against him under this Act, may be validly made upon him in any manner which the Judge may order, upon application to him in that behalf; and in proceedings for compulsory liquidation, concurrent Writs of Attachment may be issued, if required by the plaintiff, addressed to the sheriffs of districts or counties in any part of Canada other than the District or County in which such proceedings are being carried on.

Service of writ, in case Insolvent has no domicile or absconds.

Concurrent writs.

This is a consolidation of sections four and five of the Amending Act of 1865.

It has been held that a judge in insolvency has power to rescind an order made by him for substitutional service of a writ of attachment (*Eaton v. Shannon*, 17 C. P. U. C. 592).

When a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the sheriff of the county in which he resides, the County Court Judge has jurisdiction to issue another attachment to the sheriff of any County in Canada in which the Insolvent has property (*In re Beard*, 15 Grant, 441).

22. Writs of attachment in proceedings for compulsory liquidation may be made returnable after the expiry of three days from the service thereof, when the defendant resides in Canada, and not more than fifteen miles from the place of return, or when the defendant

Return of writs of attachment.

has no domicile therein ; and of one additional day for every additional distance of fifteen miles between such residence, if in Canada, and such place of return ; and immediately upon the issue of a writ of attachment under this Act, the Sheriff shall give notice thereof by advertisement thereof (Form H).

Under section 8 of the Act of 1865, the writ of attachment might be made returnable after the expiry of *five* days. Here, as in many instances elsewhere throughout this Act, the period for taking a proceeding is shortened.

Sheriff to be officer of Court issuing writs.

23. For all the purposes of such writ of attachment and in respect of all his duties regarding it, the Sheriff shall be an officer of the Court issuing such writ, and subject to its summary jurisdiction as such ; and under such writ, he shall by himself or by such agent or messenger as he shall appoint for that purpose, whose authority shall be established by a copy of the writ addressed to him by name and description, and certified under the hand of the Sheriff, seize and attach all the estate and effects of the insolvent within the limits of the County or District for which such Sheriff is appointed, including his books of account, moneys and securities for money, and all his office or business papers, documents, and vouchers of every kind and description ; and shall return, with the writ, a report under oath stating in general terms his action thereon.

His duty in executing it.

Sheriff may enter house and shop, &c. forcibly.

24. If the Sheriff or officer charged with any writ of attachment is unable to obtain access to the interior of the house, shop, warehouse, or other premises of the defendant named in such writ, by reason of the same being locked, barred or fastened, such Sheriff or officer shall have the right forcibly to open the same.

This clause is from the Act of 1865. Its absence in the Act of 1864, was felt in a case brought under the author's notice, where the insolvent kept four thousand dollars worth of goods under lock and key, in defiance of the attachment, and succeeded in secretly removing most of them before a writ of *replevin* could be issued.

25. If, in the County or District in which is situate the chief place of business of the debtor, official assignees have been appointed for the purposes of this Act, the Sheriff shall place the estate and effects attached in the custody of one of such official assignees, who shall be guardian under such writ; but if not, he shall appoint as guardian such competent and responsible person as may be willing to assume such guardianship; and the person so placed in possession shall be bound to perform all the duties hereinbefore imposed upon the interim assignee, except the calling of a meeting of creditors for the appointment of an assignee.

In whose Custody Sheriff shall place estate; duty of such person.

As to the mode of appointment of official assignees for the purposes of this Act, see below sec. 31.

When the guardian makes a reasonable claim to goods seized under execution, on application of the Sheriff an interpleader issue will be directed (*Burns v. Steel*, 2 L. J. U. C. (N. S.), 189.)

26. Except in cases where a petition has been presented as provided for by the fifteenth section of this Act, the alleged insolvent may present a petition to the Judge at any time within three days from the return day of the writ, but not afterwards; and may thereby pray for the setting aside of the attachment made under such writ, on the ground that his estate has not become subject to compulsory liquidation; or if the writ of attachment has issued against a debtor by reason of his neglect to satisfy a writ of execution against him as hereinbefore provided, then on such ground, and also on the ground that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities; and such petition shall be heard and determined by the Judge in a summary manner, and conformably to the evidence adduced before him thereon; but proceedings for compulsory liquidation shall not be contested either as to form or upon the

When petition may be presented by insolvent.

Hearing on such petition.

Proviso.

merits, otherwise than by a summary petition, in the manner, upon the grounds, and within the delay, hereinbefore provided.

In this clause are embraced the provisions of sec. 3, sub-sec. 12, Act of 1864, and sec. 11 of the Act of 1865.

The time for presenting the petition was, heretofore, within *five* days from the return day of the writ. It has been considered that after the expiration of the five days from the return day of the writ of attachment, the plaintiff cannot settle with the defendant, or withdraw his writ. The estate is then in insolvency, and subject to compulsory liquidation; and the creditors have acquired such an interest in the estate as to entitle them to intervene under sub-sec. 13 of sec. 3. of the Act of 1864 (*Worthington v. Taylor*, 10 L. J. U. C., 333.)

Meeting of
creditors,
how called.

27. Immediately upon the expiration of three days from the return day of the writ, if no petition to quash or to stay proceedings be filed, or upon the rendering of judgment on the petition to quash, if it be dismissed, or immediately upon such return with the consent of the insolvent, the Judge, upon the application of the plaintiff, or of any creditor declaring in such application that he thereby intervenes for the prosecution of the cause, shall order a meeting of the creditors to be held at a time and place named in such order, and after due notice thereof by advertisement, for the purpose of appointing an assignee; and the guardian shall perform the duties imposed upon the interim assignee by section four of this Act.

The notice of this meeting of creditors shall be given by publication thereof for two weeks in the *Canada Gazette*, and in a newspaper published at or nearest to the place where the insolvent has his chief place of business, if such newspaper be published within ten miles of such place, and notices of the meeting must also be sent by mail (see below, sec. 117). It is very difficult, however, to see how the Judge could have notices sent to "all creditors, and to all representatives of foreign creditors within the Province," when there has been no list of creditors brought before him at this stage of the proceedings.

Who shall
preside at
meeting.

28. At the time and place appointed, the Judge or the prothonotary or clerk of the Court in which the proceedings are carried on shall preside, and the creditors shall have the right to appoint an assignee to the

estate and effects of the Insolvent, and the presiding officer shall draw up and sign a record of such appointment which shall be a record of the Court, but if no creditor be present at such meeting the presiding officer shall have power to adjourn such meeting.

Appoint-
ment of
Assignee.

Formerly (Act of 1864, sec. 3, sub-sec. 14), unless the creditors were unanimous, the judge had the appointment of the assignee with some restrictions as to his choice. Now he merely places the decision of the creditors on record. As to the mode of voting by the creditors at this meeting, see below, section 118.

The person, who is thus appointed assignee, is much the same as the creditors' assignee in England. It would seem that the number of creditors present at the meeting for the appointment of an assignee is not material; it has been held that even if one only be present he may elect himself (*Coke*, 286).

A solicitor, who is thenceforth to conduct the proceedings under the bankruptcy, may be appointed by the assignee as soon as he is chosen (*Ex parte Tomlinson*, 2 Rose, 66). This may be either the Solicitor who applied for the writ of attachment, or another. The assignee may also remove the solicitor he has appointed (*Ex parte Hardy*, 1 Rose, 395).

An assignee has the sole right to select his own professional adviser, and he cannot be made to change him, except upon reasonable ground, and then only upon the penalty of being himself removed from his office of assignee in case of refusal (*Re Lamb*, 17 C. P. U. C. 173).

29. Upon the appointment of the assignee, the guardian shall immediately deliver the estate and effects in his custody to such assignee; and by the effect of his appointment, the whole of the estate and effects of the Insolvent, whether real or personal, movable or immovable, as existing at the date of the issue of the writ, and which may accrue to him by any title whatsoever, up to the time of his discharge under this Act, and whether seized or not seized under the writ of attachment, shall vest in the said assignee in the same manner, to the same extent, and with the same exceptions, as if he had been duly appointed assignee to such insolvent under a voluntary assignment of his estate and effects executed by the insolvent to an interim assignee, and such estate and effects had been duly transferred to him as hereinbefore provided.

Transfer of
estate from
guardian to
assignee.

By section 59 (below), no lien or privilege shall be created by a judgment or execution, or even by a seizure and sale under an execution, if the moneys

actually levied under the writ have not been paid over to the plaintiff before an assignment or the issue of an attachment under this Act. The Act of 1865 (sec. 12) did not go so far as this in favor of the assignee, who could only claim the assets so long as they were not actually sold by the sheriff. These amendments to the Act of 1864 remove to a great extent the opportunity for the preferential judgments so usually given by debtors in insolvent circumstances. An equal distribution of the estate of an insolvent is the aim of these laws, and this object could scarcely be accomplished so long as it was in the power of a bankrupt to give disgraceful preferences by allowing a favored creditor to obtain a judgment by default, and secure priority of execution.

The necessity for a change was shewn in a striking manner by the decision in *Thorne v. Torrance*, 16 U. C., C. P. 445 (affirmed on appeal, 18 U. C. C. P. 29). In that case certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Act of 1864. Thorne subsequently to this deed issued a writ of execution against the debtors, and then himself took proceedings in insolvency against their estate for the general benefit of creditors. It was held that the assignment was an act of bankruptcy and void, and therefore the execution plaintiff, although also petitioner in insolvency, could enforce his execution against the debtors of the estate to the postponement of the rest of the creditors. This decision was followed in *Rose v. Brown*, 16 U. C. C. P. 477.

The lien of a vendor for unpaid purchase money attaches to the land in the hands of the assignee in insolvency of the purchaser (*Van Wagner v. Findlay*, 14 Grant, 53; *Mitford v. Mitford*, 9 Ves., 100; *Grant v. Mills*, 2 Ves. & B., 306; *Chapman v. Tanner*, 1 Vern., 267).

Where a writ of *fi. fa.* issued on judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance it was held to be irregular; and the defendant having made a voluntary assignment five days after the issue of the writ, the assignee succeeded in setting aside the execution with costs (*Randall v. Bowman*, 1 L. J. U. C. (N.S.) 158.) This case was decided under the Act of 1864; and does not touch the question whether after a sale under such an irregular execution, even since the passage of the amending Act of 1865, sec. 13, or after payment over of the proceeds since this Act, the assignee could secure for the general creditors the proceeds of the sale, as against the execution creditor.

Where a final judgment in default of appearance to a specially endorsed writ was entered on 23rd January, and execution issued on 30th of same month, and a writ of attachment under the insolvent Act issued on 3rd February, an application on 28th March, at the instance of the official assignee, to set aside the judgment, as irregular for a defect in the affidavit of service was held to be too late (*Dunn v. Dunn*, 1 L. J. U. C. (N.S.) 239).

Proof and
registry of
appoint-
ment.

30. An authentic copy or exemplification, under the hand of the Court, of the record of appointment of an assignee, may be registered at full length in any registry office, without any proof of the signature of the officer and without any memorial; and such registration shall have the same effect as to the real estate

of the insolvent and in all other respects, as the registration under this Act of a deed of assignment with deed of transfer annexed.

As to the registration of a deed of assignment with deed of transfer annexed, see above, sec. 12, and note.

31. The Board of Trade at any place, or the Council thereof, shall within three months from the time at which this Act shall come into force, and afterwards, from time to time, within three months after any vacancy by the death, resignation or removal of any official assignee, name any number of persons within the County or District in which such Board of Trade exists, or within any County or District adjacent thereto in which there is no Board of Trade, to wit: at least one Official Assignee for each of such Counties, and at least three Official Assignees in each District of the Province of Quebec, to be official assignees for the purposes of this Act, and at the time of such nomination shall declare what security for the due performance of his duties, shall be given by each of such official assignees before entering upon them; and a copy of the resolution naming such persons, certified by the Secretary of the Board shall be transmitted to the Prothonotary or Clerk of the Court in the District or County within which such assignees are resident respectively; and such copy shall be *prima facie* evidence of the appointment of an official assignee; but such nomination may be made by the Judge, in any District or County wherein or adjacent to which no Board of Trade exists, and also in such District or County wherein, or adjacent to which a Board of Trade exists, but in which the Board of Trade shall have failed to make such nomination during the delay aforesaid, and in that case the Judge shall certify such nomination under his hand, and shall file such certificate in the office of the Court over which he presides;

Appointment of official assignees by Board of Trade.

In places where there is no Board of Trade.

Security by and removal of assignees.

Present
official
Assignees
continued.

and such security as such Judge shall declare in such nomination, shall be given by such official assignee; and the Board or Judge who has appointed an Official Assignee or the Judge having jurisdiction at the domicile of such Official Assignee, may remove him upon petition to that effect duly notified to such Official Assignee, and upon such notice and for such causes as such Board or Judge may deem sufficient; but such removal shall not have the effect of removing such Official Assignee from the office of Assignee to any estate to which he has previously been appointed; and all official assignees now holding that office shall continue to hold the same, but subject to all the provisions of this Act with respect to official assignees.

This section gives powers to the County Judge to appoint official assignees, and also provides for their removal for cause.

As the assignee is subject to the summary jurisdiction of the judge (see below, sec. 50), he may be removed from the charge of an estate, as well as from his official situation under this section. It may be well in this place to consider fully the principles upon which assignees have been removed under the English practice.

Lord Hardwicke stated the rule as to removal to be, that the assignees ought to be continued unless the petitioners seeking their removal could shew that there was some objection with regard to the substance or the integrity of the persons who are chosen assignees (*Ex parte Gregnier*, 1 Atk. 91); as where the party chosen has an interest adverse to that of the general body of creditors (*Ex parte Candy*, M. & McA. 198); or is an accounting party to the estate (*Ex parte Bates*, 1 Bank & Ins. Rep. 285).

The Court will set aside the choice of the creditors, and direct a new one to be made, if the parties voting in the choice be not entitled to vote (*Ex parte Rowe*, DeG. Rep. 111), or, if a person, who is liable to account to the bankrupt's estate, be the only one who has proved, and elect himself (*Ex parte Grimsdale*, 28 L. T. Rep. 207); or if the bankrupt have interfered in the choice (*Ex parte Molineux*, 3 M. & A. 703); or may exercise an undue influence over the party chosen (*Ex parte Morse*, DeG. 478); or if the choice have been procured by fraud (*Ex parte Surtees*, 12 Ves. 10). In the last cited case, Lord Eldon said, "It is a general rule that the appointment of assignees will not be disturbed when chosen by those who can make immediate proof, although those who may not have been prepared to do so would have turned the scale (see also *Ex parte Woolley*, 1 G. & J. 366; *Ex parte Butterfill*, 1 Rose 195). But where the majority of the creditors were accidentally excluded from voting in the choice (*Ex parte Dechapeauronge*, M. & M. C. A. 174); or had not sufficient notice to enable them to be present (*Ex parte Morris*, 1 Dea. 498), a new choice will be directed. So also where the assignee had been chosen without his consent or knowledge and declined to act (*Ex parte Pearson*, 3 Dea. 324). If an assignee appoints a solicitor

who is related to the insolvent, and refuses to remove him, he may be himself removed (*Ex parte Bates*, 1 DeM. & G. 452). If an assignee be guilty of any misconduct, or misbehave himself in the trust reposed in him, he will be removed and ordered to pay the costs consequent upon his removal (*Ex parte Angle*, 4 D. & C. 118). So an assignee may be removed where he improperly connives at the insertion in the insolvent's balance sheet of a petitioner's debt, or when the assignee becomes insolvent (*Ex parte Perryer*, 1 M. D. & D. 276; *Ex parte Surtees*, 12 Ves. 10); but the petition must be presented promptly (*Ex parte Coslett*, 1 Moll. 62). Mere poverty, though of itself not a sufficient ground of removal, yet if attended by suspicious circumstances, as the use of fictitious votes in the assignee's election, will warrant a removal (*Ex parte Copeland*, 1 M. & A. 305). As stated already, the Court will remove an accounting party to the estate from the office of assignee (*Ex parte Mendel*, 4 D. & C. 725; but see *Ex parte Doyle*, 2 Moll. 149). Where an assignee, acting under a *bonâ fide* belief that all the other creditors were to be compounded with, agreed with the bankrupt to compromise his own debt, the court declined to remove him (*Ex parte Davison*, 2 Bank. & Ins. Rep. 89).

If an assignee abscond, or become permanently resident out of the country, another will be chosen in his place (*Ex parte Higgins*, 1 Ba. & Be. 218; *Ex parte Grey*, 13 Ves. 274). By the English Act of 1861, sec. 124, continued residence out of England for three months, is a sufficient reason for removing an assignee.

Assignees will not be permitted, either directly or indirectly, to become purchasers of any of the insolvent's property (*Ex parte Badcock*, M. & McA., 231, 238); and any assignee so purchasing without leave of the Court, will be removed, and ordered to account for the profits (*Ex parte Alexander*, 1 Dea. 273); but see (*Ex parte Thomson*, 9 L. J. Chy., 17), where the purchase of a small portion only of the estate by the assignee did not justify his removal.

Where there was no doubt of the respectability of an assignee, and the creditors were desirous of continuing him in his office, and had given their sanction to the application, he was permitted to bid at the sale of the bankrupt's estate (*Ex parte Moreland*, M. & McA., 76; Anon, 2 Russell, 350).

If an assignee wish to purchase at any sale of the insolvent's property, he must first petition the Court to be discharged from his office (*Ex parte Alexander*, 1 Dea. 273), when the court will make the order, but the petitioner must pay his own costs of the petition (*Ex parte Perkes*, 3 M. D. & D. 385). This petition must be served on the insolvent, and in England, where there is often more than one assignee, upon the co-assignee (*Ex parte Bage*, 4 Madd, 459); here no doubt the inspector should be notified.

32. Such security shall be taken in the name of office of the President of such Board of Trade or Judge for the benefit of the creditors of any person whose estate is or subsequently may be, in process of liquidation under this Act; and in case of the default of any such official assignee in the performance of his duty, his security may be enforced and realized by the Assignee

To whom and for whose benefit the security shall be given.

Proviso ;
creditors
may require
further se-
curity.

If more than
one insol-
vent estate
has claims
on it.

of the estate which suffers by such default, then or subsequently appointed, who may sue in his own name as such assignee upon such security ; Provided always that the giving of such security shall not prevent the creditors of any insolvent from requiring security to be given for their benefit as hereinafter provided ; but in that case the security taken in the name of the President of the Board of Trade or Judge shall be regarded as supplementary to the security so required, and shall be enforceable on'y after discussion of such security ; and upon the security so given coming to an end, the Official Assignee shall be incapable of being appointed interim assignee or guardian until new security be given instead thereof to the satisfaction of the official receiving the same ; and if in case of such default it be found that more than one insolvent estate has claims upon such security, the total amount claimed, not exceeding the amount of such security, shall be payable to such of the assignees of such estates, as shall be named by the President of such Board of Trade or Judge by an instrument in writing, for that purpose, and may be claimed and recovered by such assignee after a copy of such nomination has been delivered to the surety, who shall be discharged by such payment ; and thereafter the assignee so named shall distribute the amount so received among the claimants thereof including the estate represented by himself, in the next dividend sheet of such estate, subject to contestation like all other items in such sheet ; and he shall receive in respect of the amount so received and distributed, a commission of one half per centum thereon and no more.

The provision as to additional security here referred to, is contained in section 39 below.

Conserva-
tory pro-
ceedings.

33. The interim assignee or guardian shall have the right in his own name, and in his capacity of interim assignee or guardian, as the case may be, to

institute any conservatory process or any process or proceeding that may be necessary for the protection of the estate, provided that he shall first have obtained the authority of the Judge for so doing.

This is taken from sec. 9 of the Act of 1865, with the addition of the words "or any process or proceeding."

34. At the first meeting of creditors which shall be held for the appointment of an assignee either on a voluntary assignment or in compulsory liquidation, or at any subsequent meeting, the creditors may appoint one or more inspectors either from among themselves, or otherwise, whose services may be gratuitous, or paid for, as the creditors shall decide at such meeting, and who shall superintend and direct the assignee in the performance of his duties under this Act, until the next meeting of creditors; and if their appointments be not then or at some subsequent meeting revoked, they shall continue to hold the same till the final closing of the estate; and at such meeting, and at subsequent meetings from time to time the creditors may fix, by resolution, the City, Town or other place in which meetings of creditors shall thereafter be held; and thereafter no meetings held elsewhere shall be valid; and whenever under this Act the consent authority or direction of the creditors is required, to enable the assignee to perform any act, or to adopt any course, the unanimous consent, sanction, authority or directions of the inspectors, if any there be, evidenced by a writing signed by them and deposited with the assignee, shall be held and taken to be the consent, sanction, authority or directions of the creditors in that behalf, save and except in the case of the proposed sale of the entire estate of the Insolvent as hereinafter provided; subject always however to revision by the creditors at any meeting thereof held for the purpose.

Inspectors
may be
appointed
by creditors.
Their duties.
Term of
office, &c.

Place for
meetings to
be fixed.

Inspectors
to represent
the creditors

The provisions of this clause are new, and highly important. Inspectorship of this kind is unknown in the English bankruptcy laws, under which inspectors are only appointed in case there are joint and separate creditors of the bankrupt, to look after the interests of the separate or of the joint creditors as a class (*Ex parte Miles*, 2 Rose, 68; *Ex parte Bosano*, 1 Rose, 266; *Ex parte Roberts*, 29 L. T. Rep. 390).

The power here given to the inspector is very great. He, in fact, occupies the position and influence of the whole body of creditors between the meetings, and superintends and directs the assignee in the performance of all his duties. The gain to the creditors of an insolvent when they select a man of experience and ability as their inspector, must be very great. They, in the first place, save their time, which is far more profitably occupied in attending to dealings with solvent debtors. They also have a perpetual check upon the assignee, and from the distance at which the assignee often resides and the anxiety he sometimes exhibits to seek a discharge for the insolvent rather than a large dividend for the creditor, this constant supervision is invaluable. Then, it will also be an important part of the duties of the inspector, to detect, follow up and punish all flagrant cases of fraudulent dealing; and a foreknowledge on the part of debtors that this is to be expected, will prevent a repetition of the frequent cases of dishonest bankruptcy, hitherto as notorious as they have been unchallenged.

The right granted by this section to the creditors of selecting any place they may deem the most suitable for future meetings, will be found a useful privilege.

If an offer of composition be made and accepted.

35. If at such meeting the Insolvent shall make an offer of composition, and such offer be approved by the creditors, they may make such order as they may deem expedient, either for suspending the disposal of the estate and all or any proceedings tending thereto, for such time as may be fixed by such meeting, or for any other purpose.

This clause is new, and affords the earliest opportunity for a consideration by the creditors of propositions for a prompt settlement of the affairs of the insolvent by means of composition and discharge. For the manner of carrying out offers for composition see below sec. 95 *et seq.*

OF ASSIGNEES.

Notice by Assignee, Form.

36. Immediately upon his appointment the assignee shall give notice thereof by advertisement (Form I).

Calling meetings of creditors.

37. The assignee shall call meetings of creditors, whenever required in writing so to do by the inspectors, or by five creditors stating in such writing the purpose of the intended meeting and making themselves liable

for the expense of calling the same; or whenever he is required so to do by the Judge, on the application of any creditor, of which application he shall have notice; or whenever he shall himself require instructions from the creditors; and he shall state succinctly in the notice calling any meeting, the purpose of such meeting.

In default of a resolution by the creditors (under sec. 35, above), fixing the place of meeting, the county town of the county in which the assignment is filed, is the place where the assignee should call all meetings (*Re Atkins*, 2 L. J. U. C. (N.S.) 25).

38. The assignee shall be subject to all rules, orders and directions, not contrary to law, or to the provisions of this Act, which are made for his guidance by the creditors; and until he receives directions from the creditors in that behalf, if there be a Bank or agency of a Bank in the place or county in which the insolvent has his place of business or within fifteen miles of such place, he shall deposit weekly, at interest, in the name of the estate, all moneys received by him, in the Bank or Bank agency in or nearest to the place where the Insolvent so carries on business; but he shall not deposit moneys belonging to the estate, in his own name in any Bank, on pain of dismissal by the Judge on the summary petition of any creditor; and the interest received upon deposits shall appertain to the estate, and shall be distributed in the same manner and subject to the same rights and privileges as the capital from which such interest accrued; and if in any account or dividend sheet made subsequent to any deposit in a Bank, the assignee shall omit to account for or divide the interest then accrued thereon, he shall forfeit and pay to the estate to which such interest appertains, a sum equal to three times the amount of such interest; and he may be constrained so to do by the Judge upon summary petition and by imprisonment as for a contempt of Court; And at every meeting of inspectors or of creditors, the assignee shall pro-

Assignee to obey instructions and deposit moneys in a Bank, &c.

Interest thereon.

Bank pass-
book to be
produced.

duce a Bank pass-book shewing the name in which the Bank account of the estate is kept at such Bank, and all the transactions with such Bank, connected with such account, of which production mention shall be made in the minutes of such meeting, or it shall be conclusively presumed not to have been produced thereat.

Whether assignees have hitherto neglected to account for interest upon moneys of the estate in their hands or not, this provision on the subject, which is quite new, is one that should be strictly observed, and the observance should be universally enforced by creditors.

The powers conferred upon creditors, of controlling the action of assignees in this and other sections, are far more extensive than in the English Acts.

Further
duties of
Assignees,
to keep
minutes, &c.

39. The interim assignee, assignee or guardian, as the case may be, shall attend all meetings of creditors, and take and preserve minutes of such meetings, signed by himself, and signed and certified at the time by the Chairman, or by three creditors present at the meeting; and the assignee shall also keep a correct register in duplicate of all his proceedings, and of the reception of all papers and documents served upon or delivered to him, and of all claims made to or before him, and shall enter therein in the first place the minutes of all meetings of creditors held before or at the time of his appointment, as delivered to him; one of which duplicates shall remain in the office of the Prothonotary or Clerk of the Court, and shall be written up and completed by the assignee monthly from the duplicate in his own possession; and also if required, and independent of the security hereinbefore required to be given, the assignee, in any case, shall give such other security, and in such manner, as shall be ordered by a resolution of the creditors, and shall conform himself to such directions in respect thereof, and in respect of any change or modification thereof or addition thereto, as are subsequently conveyed to him by similar resolu-

To give
further
security if
required.

tions; and in every such case, the bond or instrument of security shall be taken in favor of the creditors, by the name of the "Creditors of A. B., an Insolvent, under the Insolvent Act of 1869," and shall be deposited in the office of the Court, and in case of default by the assignee on whose behalf it is given, may be sued upon by any assignee, who shall be subsequently appointed, to the same estate, in his own name as such assignee; And it shall be the duty of the assignee at the meeting by which he is appointed, if present thereat, or if not, then at the next meeting thereof, to bring before such meeting the question of the security to be given by him.

Form of
bond, &c.

It is of course in the option of the creditors whether they interfere with the amount or terms of the existing security furnished by the assignee.

40. All powers vested in any Insolvent which he might have legally executed for his own benefit, shall vest in, and be executed by the assignee, in like manner and with like effect as they were vested in the Insolvent, and might have been executed by him; but no power vested in the Insolvent or property or effects held by him as Trustee or otherwise for the benefit of others shall vest in the assignee under this Act.

Powers of
Insolvent
vested in
Assignee.

Exception.

It is probable that the general jurisdiction of the Court of Chancery in all matters relating to trusts would place it in the power of that Court to appoint a new trustee in case of the bankruptcy of a former one; although it was thought necessary to clothe the Court in England with that power by statute (6 Geo. IV. c. 16, s. 79; 12 & 13 Vic. c. 106, s. 130). These provisions, however, do not render it imperative on the Court to remove a trustee from the trust upon his bankruptcy; but he will be removed if his bankruptcy in the smallest degree endangers the trust (*In re Bridgman's Trust*, 6 Jur. (N.S.) 1065). In case of the bankruptcy of a trustee the Court of Chancery may appoint a receiver to act in his stead (*Ex parte Ellis*, 1 Atk. 101; *Langley v. Hawke*, 5 Mad. 46).

41. The assignee shall wind up the affairs of the insolvent, by the sale, in a prudent manner, of all Bank and other stocks, and of all movables belonging to him, and by the collection of all debts, but in all of such respects shall be guided by the direction of the

Assignee to
sell property
of Insolvent,
and in what
manner.

Proviso for
sanction of
creditors.

creditors given as herein provided ; but nothing in this Act contained shall prevent the assignee from selling the entire estate and effects of the Insolvent, real and personal, in one lot, either for a gross price, or at a dollar rate upon the liabilities of the Insolvent, and upon such other terms and conditions as to the payment of the price, the payment or assumption and payment, by the purchaser of mortgages or hypothecary debts, and the payment of privileged debts, as may be considered advantageous, such conditions however, in the case of mortgages, hypothecations, or privileged claims, not to diminish the security of the creditors holding the same, nor to extend the term of payment agreed to by them, without their express consent: Provided always that such sale and all and every the terms and conditions thereof and connected therewith, be first approved at a meeting of creditors ; and such meeting may be held at any time after the appointment of an assignee, provided notice by advertisement as provided by this Act, has been given by the assignee, interim assignee or guardian, as the case may be.

The new provision in the latter part of this section, as to selling the entire estate of the insolvent *et c.* is in accordance with the suggestion of the select committee of the House of Commons on Bankruptcy and Insolvency, who considered that this mode of closing an estate might occasionally be advantageously resorted to.

Assignee to
sue for debts
due to In-
solvent.

42. The Assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the Insolvent of every kind and nature whatsoever ; for rescinding agreements, deeds and instruments made in fraud of creditors and for the recovery back of monies alleged to have been paid in fraud of creditors, and to take, both in the prosecution and defence of suits, all the proceedings that the Insolvent might have taken for the benefit of the estate, or that any creditor might have taken for the benefit of the creditors generally ; and may intervene

and represent the Insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein, in the place of that of the Insolvent: And if after the appointment of an assignee, and before he has obtained his discharge under this Act, the insolvent shall sue out any writ or institute, or continue any proceeding of any kind or nature whatsoever, he shall give to the opposite party such security for costs as shall be ordered by the Court before which such suit or proceeding is pending, before such party shall be bound to appear or plead to the same or take any further proceeding therein.

If the Insolvent sues for the same.

A and B, traders made an assignment under the Insolvent Act. A judgment at law having been obtained against A, his interest in the partnership assets was sold for a nominal consideration to C, who had notice of the insolvency proceedings. C then entered into possession of and otherwise interfered with the partnership goods, so as to hinder the plaintiffs from executing the duties of their office: an injunction was granted, on application of the assignees, to restrain the defendant from further interference (*Wilson v. Corby*, 11 Grant, 92).

An objection was raised to an application under this provision by an official assignee to be allowed to intervene and represent the insolvent in a suit wherein the insolvent was plaintiff, on the ground that the insolvent plaintiff was a foreigner neither resident nor domiciled in Canada. The point is of much importance, and was raised, though not decided in *Mellon v. Nicholls*, 27 Q. B. U. C. 167. It was considered necessary in the English Act of 1861, sec. 277, to enact that it should extend to aliens and denizens, both to make them subject thereto and to entitle them to all the benefits given thereby.

If the assignee decline to prosecute a suit, the creditors are entitled to do so, upon indemnifying the assignee against costs, &c. (10 L. J. (N.S.) 102, and see sec. 45, below).

To a suit for foreclosure against the assignee of the estate of a bankrupt mortgagor, the bankrupt is not a necessary party (*Torrance v. Winterbottom*, 2 Grant, 487).

A bill filed by one of the creditors of an insolvent to recover property alleged to belong to the insolvent's estate, on the mere allegation that the assignee in insolvency refused to sue without an indemnity against the costs of the suit, and that the plaintiff, through poverty, was unable to give such indemnity, is demurrable (*Davis v. Snell*, 2 DeG. F. & J. 463).

Even the charge of fraud, in a bill filed against a bankrupt and his assignees, seeking to set aside certain conveyances as having been fraudulently procured by the bankrupt before the bankruptcy, does not justify the making the bankrupt a party (*Gilbert v. Lewis*, 2 J. & H. 452).

In the same case it was also held, that although a decree declaring the deeds to be fraudulent would in a sense make the bankrupt a trustee of the property, this was not sufficient to make him a proper party to the suit.

Following *Gilbert v. Lewis*, a demurrer by an insolvent, on the ground that he was not a proper party, was allowed in *Wilson v. Chisholm*, 11 Grant, 471; where a bill was filed by assignees under the Insolvent Act to set aside a settlement executed by the insolvent, on the marriage of his daughter, with a secret trust in his own favour, the bill also charging that the insolvent defendant was in the enjoyment of the property. It is remarked in the judgment that "one reason given for allowing parties to a fraud to be made defendants in certain cases, though no relief except costs is prayed against them, is that the plaintiff may be assured of his costs," and it must be admitted that this reason can seldom be applicable to the case of a bankrupt.

If a partner becomes insolvent, partnership thereby dissolved, &c.

43. If a partner in an unincorporated trading company or co-partnership, becomes insolvent within the meaning of this Act, and an Assignee is appointed to the estate of such Insolvent, such partnership shall thereby be held to be dissolved; and the Assignee shall have all the rights of action and remedies against the other partners in such company or copartnership, which any partner could have or exercise by law or in equity against his co-partners after the dissolution of the firm; and may avail himself of such rights of action and remedies, as if such co-partnership or company had expired by efflux of time.

The enactment here that a partnership becomes dissolved by the bankruptcy of a member of the firm is merely the repetition of a well understood doctrine of the English law (See *Story on Partnership*, sec. 313).

C. entered into an agreement with R. that R. should buy and sell goods on behalf of C., and that the business should be carried on as R. & Co. R. being paid by a salary and a per centage on profits. The business was managed by R., but C. had bought goods for it. Each became bankrupt, and it was held that the book debts and stock in trade of R. & Co. were joint estate of the two (*In re Rowland & Crankshaw*, 1 L. R. Chy. 421).

Sale of debts the collection of which would be too onerous.

44. After having acted with due diligence in the collection of the debts, if the Assignee finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he may report the same to the creditors, and with their sanction he may obtain an order of the Judge to sell the same by public auction, after such advertisement thereof

as may be required by such order : and pending such advertisement, the Assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts ; but all debts amounting to more than one hundred dollars shall be sold separately except as herein otherwise provided. Proviso.

45. If at any time any creditor of the Insolvent shall desire to cause any proceeding to be taken which in his opinion would be for the benefit of the estate, and the assignee shall under the authority of the creditors or of the Inspectors refuse or neglect to take such proceeding after being duly required so to do, such creditor shall have the right to obtain an order of the Judge authorizing him to take such proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe, and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit and that of any other creditors who have joined him in causing the institution of such proceeding ; but if before such order is granted, the assignee shall signify to the judge his readiness to institute such proceedings for the benefit of the creditors, the order shall be made prescribing the time within which he shall do so, and in that case the advantage derived from such proceeding shall appertain to the estate. A creditor may obtain an order of a Judge authorizing him to take any special proceedings at his own risk.

46. The person who purchases a debt from the Assignee may sue for it in his own name, as effectually as the Insolvent might have done and as the Assignee is hereby authorized to do ; and a Bill of Sale (Form K), signed and delivered to him by the Assignee, shall be *prima facie* evidence of such purchase, without proof of the handwriting of the Assignee ; and no Rights of purchasers of insolvents' debts.

warranty, except as to the good faith of the Assignee, shall be created by such sale and conveyance, not even that the debt is due.

Sale of real estate, on certain conditions.

47. The Assignee may sell the real estate of the Insolvent, but only after advertisement thereof, for a period of two months, and in the same manner as is required for the actual advertisement of sales of real estate by the sheriff in the district or place where such real estate is situate, and to such further extent as the assignee deems expedient; but the period of advertisement may be shortened to not less than one month by the creditors with the approbation of the Judge; but in the Province of Quebec such abridgment shall not take place without the consent of the hypothecary creditors upon such real estate, (if any there be) and if the price offered for any real estate at any public sale duly advertised as aforesaid, is, in the opinion of the Assignee, too small, he may withdraw such real estate, and sell it subsequently under such directions as he receives from the creditors.

The time and manner of advertising the sales of real estate by the sheriff in Ontario are pointed out in the Common Law Procedure Act (Con. Stats. U. C., ch. 22, s. 267), which enacts as follows:—

“Before the sale of real estate upon execution against lands and tenements, the sheriff shall publish an advertisement of sale in the *Canada Gazette*, at least six times, specifying,—

“First: The particular property to be sold;

“Second: The names of the plaintiff and defendant;

“Third: The time and place of the intended sale; and he shall for three months next preceding the sale also publish such advertisement in a public newspaper of the county in which the land lies, or shall for three months put up and continue a notice of such sale in the office of the Clerk of the Peace, or on the door of the Court House, or place in which the Court of General Quarter Sessions for such county is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day.”

By Stats. Ontario, 31 Vic. cap. 6, this notice will be in the *Ontario Gazette*.

Effect of sales of real estate.

48. All sales of real estate so made by the Assignee, shall vest in the purchasers all the legal and equitable estate of the insolvent therein, and in all respects shall have the same effect as to mortgages, hypothecs or

privileges then existing thereon, as if the same had been made by a sheriff in the Province in which such real estate is situate, under a writ of execution issued in the ordinary course, but no other, greater, or less effect than such sheriff's sale; and the title conveyed by such sale shall have equal validity with a title created by a sheriff's sale; and the deed of such sale which the Assignee executes (Form L), shall have the same effect as a sheriff's deed has in the Province within which the real estate is situate; but he may grant such terms of credit as he may deem expedient, and as may be approved of by the creditors, for any part of the purchase money; except that no credit shall be given in the Province of Quebec for any part of the purchase money coming to any hypothecary or privileged creditor without the consent of such creditor; and the Assignee shall be entitled to reserve a special hypothec or mortgage by the deed of sale as security for the payment of such part of the purchase money as shall be unpaid; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where the real estate sold is situate.

Form of
deed and
terms.

This section gives the same effect to a sale of real estate by an assignee as if the sale had been made by a sheriff under a writ of execution. The title that is given by a sheriff's sale is the title that was in the execution debtor at the time the writ was placed in the sheriff's hands. It therefore seems clear that a purchaser from an assignee under a voluntary assignment would obtain the title of the insolvent in the property at the date of the assignment; and in the case of a compulsory liquidation the assignee would convey the title that the insolvent had at the time the writ of attachment was placed in the sheriff's hands (see above, sec. 29).

The sale of the interest of an insolvent mortgagor in the mortgaged lands, by an assignee, will be governed, no doubt, by the same regulations as a similar sale by a sheriff. The Common Law Procedure Act (Con. Stats. U. C., c. 22, sec. 258), provides for such cases as follows:—

“The effect of such seizure or taking in execution, sale and conveyance of any such mortgaged lands and tenements, shall be to vest in the purchaser, his heirs and assigns all the legal and equitable interest of the mortgagor therein, at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed as well as at the time of such sale, and to vest in such purchaser, his heirs and assigns, the same rights as such

mortgagor would have had if such sale had not taken place; and the purchaser, his heirs or assigns may pay, remove, or satisfy, any mortgage, charge or lien, which at the time of such sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done, and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title, as the mortgagor would have acquired in case the payment, removal or satisfaction, had been effected by the mortgagor." It is probable that the provisions for a discharge of the mortgage by the mortgagee upon receiving payment of the amount due, from the purchaser, in sales by the Sheriff, would be applicable to sales by an assignee. For such provisions see the section of the Com. Law Procedure Act quoted above.

It is submitted that the power here granted to the assignee of reserving a special mortgage by the deed of sale as security for the payment of part of the purchase money, is a very unusual one in Canadian conveyancing; and probably the assignee will be held entitled to take a mortgage back in a separate instrument from the deed of sale, or be able only to give a bond for a deed. The object might be gained in one instrument by a grant to the vendee to hold to his own use until default made by him in some of the payments of the purchase money, and after such default to the use of the vendor (the assignee).

Sales in
Quebec may
be subject
to certain
charges.

Folle enchère

Certificate of
Registrar.

49. In the Province of Quebec such sale may be made subject to all such charges and hypothecs as are permitted by the law of the said Province to remain chargeable thereon, when sold by the sheriff, and also subject to such other charges and hypothecs thereon, as are not due at the time of the sale, the time of payment whereof shall not however be extended by the conditions of such sale; and also subject to such other charges, and hypothecs as may be consented to in writing by the holders or creditors thereof.—And an order of re-sale for false bidding may be obtained from the judge by the assignee upon summary petition; and such re-sale may be proceeded with after the same notices and advertisements, and with the same effect and consequences as to the false bidder, and all others, and by means of similar proceedings, as are provided in ordinary cases for such re-sales, in all essential particulars and as nearly as may be without being inconsistent with this Act; and as soon as immovables are sold by the Assignee, he shall procure from the Registrar of the Registration Division in which each immovable is situate, a certificate of the hypothecs

charged upon such immovable and registered up to the day of the issue of the writ of attachment, or of the execution of the deed of assignment by which the estate of the Insolvent was brought within the purview of this Act, as the case may be ; And such certificate, shall contain all the facts and circumstances required in the Registrar's certificate obtained by the Sheriff subsequent to the adjudication of an immovable in conformity with the provisions of the Code of Procedure and shall be made and charged for by the Registrar in like manner ; And the provisions of the Code of Procedure as to the collocation of hypothecary, and privileged creditors, the necessity for and the filing of oppositions for payment and the costs thereon shall apply thereto under this Act as nearly as the nature of the case will admit ; And the collocation and distribution of the money arising from such sale shall be made in the dividend sheet in the same manner as to all the essential parts thereof, as the collocation and distribution of monies arising from the sale of immovables are made in the appropriate Court in ordinary cases, except in so far as the same may be inconsistent with any provision of this Act.

Code of Procedure to apply.

Order of distribution.

50. Every interim Assignee, Guardian and Assignee shall be subject to the summary jurisdiction of the Court or Judge in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the performance of their respective duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of the Assignee, may be obtained, by an order of the Judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceedings of any kind whatever ; and obedience by the As-

Assignees, guardians, &c., to be subject to the orders of the Court, or Judge, &c.

signee to such order may be enforced by such Judge or Court under the penalty of imprisonment, as for contempt of Court or disobedience thereto, or he may be dismissed, in the discretion of the Court or Judge.

The Act of 1864, sec. 4, sub-sec. 16, defined the duties, the performance of which may be thus enforced, to be—"Whether imposed by the deed of assignment, by instructions from the creditors validly passed by them under this Act and communicated to him, or by the terms of this Act."

Assignee
may be re-
moved or
resign.

51. Any Assignee may be removed, either at the will of the creditors or upon his own resignation, by a resolution passed by the creditors present or represented at a meeting duly called for the purpose; and if the Assignee dies or is removed they shall have the right of appointing another Assignee, either at the meeting by which he is removed, or at any other called for the purpose: but the Assignee so removed shall, nevertheless, remain subject to the summary jurisdiction of the court and of the Judge thereof, until he shall have fully accounted for his acts and his conduct while he continued to be Assignee.

Proviso.

This section consolidates sub-sections 17, 18, and 19, of the Act of 1864, and removes the distinction that prevailed between the removal of an assignee before, and his removal after the period at which dividends might be declared.

Remunera-
tion of assign-
ee, interim
assignee and
guardian.

52. The remuneration of the interim Assignee, Guardian and Assignee respectively, shall be fixed by the creditors at their first meeting or at any other meeting called for the purpose; but if not so fixed before a final dividend is declared, shall be put into the dividend sheet at a rate for the interim Assignee or Guardian, such as the Assignee shall deem reasonable, and for the Assignee not exceeding five per centum upon the cash receipts,—subject to contestation by any party interested as being insufficient or as exceeding the value of the services rendered, in the same manner as any other item of the dividend sheet; But no sum of money shall be inserted as a remuneration to the

Assignee unless the question of such remuneration shall have been previously brought before a meeting of creditors competent to decide it.

53. Upon the death of an Assignee the estate of the Insolvent shall not descend to the heirs or representatives of the Assignee, but shall become vested in any Assignee who shall be appointed by the creditors in his place and stead; and in case of the office of Assignee becoming vacant from any cause, the estate shall be under the control of the Judge, until a new Assignee is appointed.

In case of death of assignee, estate how vested.

54. After the declaration of a final dividend, or if after using due diligence the Assignee has been unable to realize any assets to be divided, the Assignee may prepare his final account, and may present a petition to the Judge for his discharge from the office of Assignee after giving notice of such petition to the Insolvent and also to the Inspectors if any have been appointed, or to the creditors by circular, if no Inspector has been appointed; and shall produce and file with such petition a bank certificate of the deposit of any dividends remaining unclaimed, or of any balance in his hands, and a statement showing the nominal and estimated value of the assets of the Insolvent, the amount of claims proved, dividing them into ordinary, privileged and hypothecary claims, the amount of dividends or of composition paid to the ordinary creditors of the estate, and the entire expense of winding up the same, and thereupon the Judge after causing the account to be audited by the Inspectors or by some creditor or creditors named by him for the purpose, and after hearing the parties, may refuse or grant conditionally or unconditionally the prayer of such petition.

Final account and discharge of Assignee.

In this section a number of practical improvements upon the old law are introduced. 1st. Cases where there are no assets to divide are provided for; 2nd. The notice of application for discharge must be given to the insolvent and inspector; 3rd. A general statement shewing the assets, the claims, and

the expense of winding up must be prepared, and, 4th. The assignee's account must be audited. It is believed that many assignees have obtained their discharges under the past law, without very satisfactory preparation of accounts for the purpose.

OF DIVIDENDS.

Accounts
and state-
ments by
assignees.

55. Upon the expiration of the period of one month from the first insertion of the advertisements giving notice of the appointment of an Assignee, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the Assignee shall prepare and keep constantly accessible to the creditors, accounts and statements of his doings as such Assignee, and of the position of the estate, and at any similar intervals shall prepare dividends of the estate of the insolvent.

The time for preparing accounts and statements and declaring dividends is here shortened from two months to one; and the intervals for dividends thereafter from six to three months.

What claims
shall rank
on the
estate.

56. All debts due and payable by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this Act, and all debts due but not then actually payable, subject to rebate of interest, shall have the right to rank upon the estate of the insolvent; and any person then being, as surety or otherwise, liable for any debt of the insolvent, who subsequently pays such debt, shall thereafter stand in the place of the original creditor, if such creditor has proved his claim on such debt; or if he has not proved shall be entitled to prove against and rank upon the estate for such debt, to the same extent and with the same effect as such creditor might have done.

Debts incurred after the execution of a deed of assignment are not provable, and therefore the insolvent is not relieved from them by a discharge under this act, although all assets acquired up to the time of the discharge are vested in the assignee (See *ante*, secs. 29 and 10).

The only reasonable mode of arriving at the rebate of interest is to adopt the date of the deed of assignment, or of the appointment of the official assignee, as the period from which it is to be calculated (Abbott, p. 40).

57. If any creditor of the insolvent claims upon a contract dependent upon a condition or contingency, which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the Judge that such reserve will probably retain the estate open for an undue length of time, he may, unless an estimate of the value thereof be agreed to between the claimant and the Assignee, order the Assignee to make an award upon the value of such contingent or conditional claim, and thereupon the Assignee shall make an award after the same investigation, and in the same manner and subject to a similar appeal, as is hereinafter provided for the making of awards upon disputed claims and dividends, and for appeals from such awards; and in every such case the value so established or agreed to shall be ranked upon as a debt payable absolutely.

Case of
contingent
claims pro-
vided for.

A claim upon a guarantee, for a sum certain when due, is provable as a debt, and before it is due it is provable as a debt due upon a contingency (*Re Willis*, 19 L. J. 30 Ex.).

Liability to calls upon shares is not provable as a debt due upon a contingency (*South Staffordshire Railway Company v. Burnside*, 5 Exch. Rep. 129).

Contingent debts where the liability is remote are not provable (*Ex p. Davis*, Mont. 121).

A., in consideration of the payment to him of a sum of money by the vendors of goods, guaranteed the payment of the purchase money by the purchasers according to the terms of the contract, viz.: by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due until after the bankruptcy of the guarantor, and upon its being dishonoured the vendors were held entitled to prove (*Ex parte Brook*, 6 D. M. & G. 771; s. c., D. M. & G., B. A. 551).

A guarantee in writing may be withdrawn at any time without the consent of the party guaranteed, provided the guarantee has not been acted upon (*Offord v. Davies*, 6 L. T. Rep., N. S., 579, C. B.).

58. In the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the

Rank and
privilege of
creditors:
Provido as
to creditors
holding
security.

provisions of this Act ; but no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent for his claim, until the amount for which he shall rank as a creditor on the estate as to dividends therefrom, shall be established as hereinafter provided ; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors, whenever under this Act such proportion is required to be ascertained.

As the law stood, although the dividend could not be paid over to the creditor holding security, it might have been reserved for him. Now the dividend can be neither "allotted" nor paid to the secured creditor until he has taken the steps provided below (secs. 60 and 61) to establish the amount of his claim.

The right of the secured creditors to vote, or sign a deed of composition and discharge, is regulated by this section. Mr. Abbott remarks (p. 41), "The law really places the creditor's vote upon a proper footing. For if a creditor could vote upon the nominal amount of his claim without reference to his security, the hypothecary creditor would often control the management of the personal property, without being interested in it to any considerable extent."

Seizure in execution after appointment of assignee : its effects.

59. No lien or privilege upon either the personal or real estate of the Insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ, the effects or estate of the Insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an interim Assignee, or shall have been placed in compulsory liquidation under this Act ; but this provision shall not affect any lien or privilege acquired before the passing of this Act or any privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have issued by reason of such issue, delivery, levy or seizure.

This varies sec. 13 of the amending Act of 1865. Under that enactment no lien by a writ of execution could be created unless the writ had issued

and been delivered to the sheriff at least thirty days before the execution of a deed of assignment or the issue of a writ of attachment. Now the dates of proceedings are unimportant so long as the moneys actually levied under the writ are not paid over to the execution creditor.

It has been held that nothing in sec. 13, amending Act of 1865, interfered with the goods sold under an execution remaining the property of the purchasers, although the writ of attachment might have issued immediately after the sale. That section, like this one, only went to divest the lien or privilege created by seizure by the sheriff. An execution was placed in the sheriff's hands on the 15th March, 1866, and on the 26th of the same month a sale of the goods thereunder commenced at 10 A. M., and was completed at 11 A. M. At the latter hour of this subsequent day a writ of attachment was placed in the sheriff's hands against the defendant. It was held that the attachment was not entitled to prevail over the execution (*Whyte v. Treadwell*, 17 C. P. U. C. 488). This case does not interfere with the decision in *Converse v. Michie*, 16 C. P. U. C. 167, where the goods were still the property of the debtor when the two writs were given to the sheriff by the execution and the attachment creditors; while in *Whyte v. Treadwell* the property was entirely gone and formed no part of the estate of the debtor when the attachment issued. It would therefore seem clear that a purchaser at sheriff's sale is amply protected, because it is the proceeds of the sale, unless actually paid over to the execution creditor, that will go to the estate, and not the goods when sold.

A stay of proceedings given to a sheriff on a writ of execution in his hands by the attorney for the execution creditor is equivalent to a withdrawal of the writ; and an execution cannot be said to be in the sheriff's hands to be executed until the stay is removed and the sheriff ordered to proceed; and it was held under the Act of 1865 that if an assignment was made within thirty days from the removal of the stay of proceedings the judgment creditor lost any privilege by the operation of the 13th section, except the costs of suit which might be proved as a privileged claim before the assignee (*Re Fair and Buist*, 2 L. J. U. C. (N.S.) 216). (*Re Heydon*, 2 L. C. 2 B. Reports, Vol. 19-p. 26.

60. If a creditor holds security from the Insolvent, or from his estate, or if there be more than one Insolvent liable as partners, and the creditor holds security from, or the liability of one of them, as security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches, by the creditor, at such specified value, or he may require from such creditor an assignment of such liability, or an assignment and delivery of such security, property

As to creditors holding security for their claims. Their right to vote, &c.

or effects, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the liability or security is retained or assumed, and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid; and if a creditor holds a claim based upon negotiable instruments upon which the Insolvent is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment he shall be entitled to amend his claim and treat such liability as unsecured.

This is sec. 5, sub-sec. 5, Act of 1864, with additions. The provision as to negotiable instruments is new; and it would seem that non-payment of a note at maturity by the maker, enables the holder to rank for the full amount of the note against the estate of an insolvent endorser without putting a value on the liability of the maker, or taking proceedings against him.

If a creditor prove a debt, in ignorance that he has a lien in respect of it, he will not be allowed, upon discovering his mistake, to set up his lien and reduce his proof accordingly (*Ex parte Spottiswood*, Fonbl. Rep. 20). Where a mortgagor becomes bankrupt the mortgagee is not obliged to file a claim, but is at liberty, instead, to exercise the power of sale contained in his mortgage. In the Court of Chancery an injunction to restrain such a sale was refused (*Gordon v. Ross*, 1 L. J. U. C. (N.S.) 106).

If the security is on realty or shipping.

61. But if the security consists of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages, hypothecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, hypothecs and liens, and upon his securing such previous charges upon the

property mortgaged, in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such previous mortgages, hypothecs and liens shall have no further recourse or claim upon the estate of the Insolvent; and if there be mortgages, hypothecs, or liens thereon subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors; or upon their fying their claims specifying their security thereon as of no value, or upon paying them the value by them placed thereon; or upon giving security to the assignee that the estate shall not be troubled by reason thereof.

The provisions in this section as to subsequent mortgages, &c., are new; otherwise it follows section 19, Act of 1865.

62. Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the Assignee to procure the authority of the inspectors or of the creditors at their first meeting thereafter, to consent to the retention of the security by the creditor, or to require from him an assignment and delivery thereof; and if any meeting of inspectors or of creditors takes place without deciding upon the course to be adopted in respect of such security the Assignee shall act in the premises according to his discretion and without delay.

Proceedings
on the filing
of a secured
claim.

This section gives some of the duties and powers of the new office of inspector.

63. The amount due to a creditor upon each separate item of his claim at the time of the execution of a deed of assignment, or of the issue of a writ of attachment, as the case may be, and which shall remain due at the time of proving such claim, shall form part of the amount for which he shall rank upon the estate of the insolvent, until such item of claim be paid in

Rank of
several
items of a
creditor's
claim.

Oath of
creditor may
be required.

full, except in cases of deduction of the proceeds or of the value of security, as hereinbefore provided; but no claim or part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same person or by different persons; and the Assignee may at any time require from any creditor a supplementary oath declaring what amount, if any, such creditor has received in payment of any item of the debt upon which his claim is founded, subsequent to the making of such claim, together with the particulars of such payment; and if any creditor refuses to produce or make such oath before the Assignee within a reasonable time after he has been required so to do, he shall not be collocated in the dividend sheet.

Insolvent
owing debts
as members
of co-part-
nership.

64. If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full.

When a firm, or when two or more partners of a firm, are jointly placed in insolvency, all the joint property of the bankrupts, as well as all the separate property of each of them, vests in the assignee (*Graham v. Mulcaster*, 4 Bing., 115). One of two partners, a few days before a writ of attachment against both, under the Insolvent Act of 1864, had issued, assigned his estate for the benefit of his creditors; and it was held that this assignment was void as against the joint assignees (*Wilson v. Stevenson*, 12 Grant, 239).

Where each of the members of a firm is separately adjudged bankrupt, the assignees of them all cannot recover in one action debts due to the firm, and also debts due to the partners separately. The assignees of each partner must sue alone for the recovery of debts due to him only (*Hancock v. Haywood*, 3 T. R. 433).

In a firm of two partners, where one partner dies, and the other becomes bankrupt, the assignees of the latter are entitled to institute a suit in behalf of themselves and all the other creditors of the deceased against his executors, for the administration of his estate, and payment of what may be due therefrom to his surviving partner (*Addis v. Knight*, 2 W. R. 119). In such cases the assignees do not become co-partners with the solvent partner. Like purchasers from the sheriff under an execution against one partner, the

assignees and the solvent partner become tenants in common of the real and personal property belonging to the firm (*Fox v. Hanbury*, 2 Cowp. 448.)

The assignees of a bankrupt partner are entitled to an account not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business (*Crawshaw v. Collins*, 15 Ves. 218; *Smith v. DeSilva*, Cowp. 469). Unless there be some misconduct on the part of the solvent partners, or unless the solvent partners are dead or abroad, the assignees have no right to interfere in the management or winding up of the partnership business. If they do interfere a court of equity will restrain them by injunction at the suit of the solvent partners (*Allan v. Kilbee*, 4 Madd. 464). Nor can the assignees compel the solvent partner to deliver up the books of the partnership (*Ex parte Finch*, 1 D. & C. 274). However, in the case of solicitors this rule has been questioned, because the clients have a voice in the control of the papers (*Davidson v. Napier*, 1 Sim. 297). The solvent partners can always be summoned before the Court and be compelled to produce the partnership books, and to answer questions relative to the dealings of the firm (*Ex parte Trueman*, 1 D. & C. 464; *Ex p. Levett*, 1 G. & J. 185).

And see *Ex parte Maude*, *In re Braginton*, 2 L. R. Chy. 550; *Ex parte Carne*, *In re Whitford*, 3 L. R. Chy. 463.

65. The creditors, or the same proportion of them that may grant a discharge to the debtor under this Act, may allot to the insolvent, by way of allowance, any sum of money, or any property they may think proper; and the allowance so made shall be inserted in the dividend sheet, and shall be subject to contestation like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or of the absence of consent by a sufficient proportion of the Creditors.

Allowance
to insolvent,
how made,
&c.

The proportion of creditors required to grant a discharge to a debtor under this act, is the majority in number of those of the creditors of the insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the insolvent (see below, sec. 94).

66. No costs incurred in suits against the insolvent after due notice of an assignment, or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of this Act, shall rank upon the estate of the insolvent; but all the taxable costs incurred in proceedings against him up to that time shall be added to the demand, for the

As to costs
in suits
against
insolvent.

recovery of which such proceedings were instituted; and shall rank upon the estate as if they formed part of the original debt.

Privilege of
clerks, &c.,
for wages.

67. Clerks and other persons in the employ of the insolvent in and about his business or trade shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of a deed of assignment or of the issue of a writ of attachment under this Act, not exceeding four months of such arrears; but such privileged amount may be increased by order of the creditors.

By the former enactment (sec. 5, sub-sec. 10, Act of 1864), the special privilege only applied to the claim for three months' arrears of salary, without the suggestive clause, contained in this section, that the privileged amount may be increased by order of the creditors.

A similar privilege in the English Acts has been held not to be limited to yearly servants only, though it must be a continued an' not a mere weekly hiring (*Ex parte Collyer*, 2 Mon. & A., 80). The misconduct of the clerk may deprive him of the benefit of this provision (*Ex parte Hampson*, 2 M. D. & D. 462). Where the clerk had left the service several months before the bankruptcy, but the leaving was not voluntary, he was held to be within the section as clerk to the bankrupt (*Ex parte Sanders*, 2 Mon. & A. 684).

Notice of
dividend
sheet, and
payment.

68. So soon as a dividend sheet is prepared, notice thereof (Form M) shall be given by advertisement, and after the expiry of one judicial day from the day of the last publication of such advertisement, all dividends which have not been objected to within that period shall be paid.

For the manner of publishing this advertisement see below, sec. 117.

The tendency of the Act to abridge periods of time is again evident in this section where a period is shortened from six days (sec. 5, sub-sec. 11, Act of 1864) to one day.

Debts of
insolvent
for which
claims are
not filed.

69. If it appears to the assignee-on his examination of the books, of the Insolvent, or otherwise, that the Insolvent has creditors who have not taken the proceedings requisite to entitle them to be collocated, it shall be his duty to reserve dividends for such creditors according to the nature of the claims, and to

notify them of such reserve, which notification may be by letter through the post, addressed to such creditors' residence as nearly as the same can be ascertained by the Assignee; and if such creditors do not file their claims and apply for such dividends previous to the declaration of the last dividend of the estate, the dividends reserved for them shall form part of such last dividend.

This should not be construed to mean that if the creditor does not demand his dividend, as well as file his claim, he will be deprived of it; for that would place this class of creditors in a different position from all others. But the filing of the claim should be held to be an application for a dividend under this clause. And if the creditor does not afterwards claim the amount awarded him, the rule as to unclaimed dividends (sec. 75 below) must be followed (Abbott, p. 44).

70. If any claim be objected to at any time, or if any dividend be objected to within the said period of one day, and any dispute arises between the creditors of the Insolvent, or between him and any creditor, as to the amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the Assignee shall proceed thereon as hereinafter provided, shall hear and examine the parties and their witnesses under oath (which oath the Assignee is hereby empowered to administer), shall take clear notes in writing of the parol evidence adduced before him, shall examine and verify the statements submitted to him, by the books and accounts of the Insolvent, and by such evidence, vouchers and statements as may be furnished to him, and shall make an award in the premises, and as to the costs of such contestation, which award shall be deposited in the Court, and shall be final, unless appealed from within three days from the date of its communication to the parties to the dispute.

Claims
objected
to, how
determined.

The County Court Judge has no power to adjudicate upon a claim until it has been decided upon by the assignee; and then by way of appeal (*In re Oleghorn*, 2 L. J. U. C. (N. S.) 183).

The assignee is empowered to hear and examine the parties and their witnesses under oath, and he should do so in the manner usual in litigation, observing the ordinary and reasonable rules as to evidence, of which the following may be stated as of the highest practical importance, and as requiring to be referred to, oftenest in ordinary cases :

1. That the burden of proof shall be upon him who affirms a proposition of fact, rather than upon him who denies it ;

2. That the party upon whom is the burthen of proof, shall begin ;

3. That the party who begins shall have the right to adduce evidence in rebuttal ; but that such evidence shall only be such as tends to destroy the case of his opponent, and not such as tends directly to sustain his own ;

4. That the party who holds the negative cannot usually adduce evidence in reply to his adversary's evidence in rebuttal ;

5. That if the parties are examined they cannot make evidence for themselves ; but that their answers cannot be divided ;

6. That the best evidence of which the case is susceptible should be adduced, and that secondary evidence should not be received until proof is made that the best evidence cannot be obtained ;

7. That on the examination of a witness in chief, leading questions are not usually permissible : but may be put on cross-examination. This rule however may be reversed if the witness is plainly hostile to the party who produces him, and favorable to his opponent.

It would be obviously impossible here, to enter into a detailed discussion of the law of evidence, but enough has been said to indicate the order in which the proceedings should be carried on before the assignee. If the dispute be conducted by counsel, the assignee will be called upon to decide questions as to the admissibility of evidence, and as to the propriety of questions put to witnesses, which might raise doubts even in the mind of a Judge accustomed to deal with them. In such cases, if the objection be to the admissibility of evidence, it would be better for the assignee to admit it, entering the objection to its admission. If it be to the propriety of a question, it is better to permit it to be put, if the assignee has any doubt, entering the objection ; and if it be an objection to the form of the question, it is always safe to insist that the question shall be so framed as to leave the facts to be related by the witness, and not put into his mouth by the questioner. And the assignee should always recollect that it is easy afterwards to disregard testimony improperly admitted ; but that the exclusion of that which ought to have been let in, is not susceptible of so simple a remedy (Abbott, p. 45).

Notice to be
given of
objections.
Award, how
made.

71. The Assignee shall not receive or notice any objection to any claim, dividend or collocation, unless such objection shall be filed before him in writing, stating distinctly the grounds of such objection, together with evidence of the previous service of a copy thereof on a claimant ; and the claimant shall have three days thereafter to answer the same, which time, however, may be enlarged by the Assignee, with a like

delay to the contestant to reply; and upon the completion of an issue upon such objection the Assignee shall fix a day for proceeding to take evidence thereon, and shall thereafter proceed therewith from day to day, unless he shall otherwise order, until the making of his award in the premises.

See note to section 70, above.

72. It shall be the duty of the inspectors and of the Assignee under their direction to examine the claims filed before the Assignee, and to obtain information as to their correctness, and when they consider it expedient that any claim, dividend or collocation be contested, they may order the contestation thereof at the expense of the estate; and such contestation may be made in their names or in the names of any creditor consenting thereto.

Inspectors may order contestation of claims.

The two preceding sections are new. The creditors may still, as well as the inspectors, authorize the costs of the contestation of any claim or dividend to be paid out of the estate (see below, sec. 73).

73. The award of the assignee as to costs may be made executory by execution in the same manner as an ordinary judgment of the Court, by means of an order of the Judge, obtained upon the application of the party to whom costs are awarded, made after notice to the opposite party; and the creditors may by resolution authorize and direct the costs of the contestation of any claim or any dividend to be paid out of the estate, and may make such order either before, pending or after any such contestation.

As to costs awarded by Assignee.

74. If, at the time of the issue of a Writ of Attachment, or the execution of a Deed of Assignment, any immoveable property or real estate of the Insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent Court, such sale shall be proceeded with by the officer charged

If there be property under seizure at commencement of proceedings.

with the same, unless stayed by order of the Judge upon application by the guardian, interim Assignee or Assignee, upon special cause shewn, and after notice to the plaintiff; reserving to the party prosecuting the sale his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to be paid by privilege out of the proceeds of the sale of such property, if made under such writ or order; but if such sale be proceeded with, the moneys levied therefrom shall be paid over to the Assignee for distribution, according to the rank and priority of the claimants thereon, and the officer charged with the execution shall make his return of such moneys to the Assignee and pay them over to him, and his return to the Court from which the writ issued, declaring that he has done so, shall be a valid and sufficient return upon such writ in so far as regards the moneys so paid over.

M, under a *fi. fa.* at his own suit against D, which was the first in the sheriff's hands, purchased certain lands in September, 1867. D. had in April previous made a voluntary assignment under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale under a section of the amending Act similar to this. M. claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The court, under these circumstances, discharged with costs an application by M. for a mandamus to compel the sheriff to convey, to which the assignee was no party (*In re Moffatt and the Sheriff of the County of York*, 27 Q. B. U. C. 52).

A plea to a declaration on a promissory note, on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against defendant under the Insolvent Act of 1864, for the same cause of action subsequently to the declaration in the cause, was held a bad plea on demurrer (*Baldwin v. Peterman*, 16 U. P. U. C. 310).

Dividends
unclaimed,
how dealt
with.

75. All dividends remaining unclaimed at the time of the discharge of the Assignee shall be left in the bank where they are deposited, for three years, and if still unclaimed, shall then be paid over by such bank with the interest accrued thereon, to the Government of Canada, and if afterwards duly claimed shall be paid over to the persons entitled thereto, with interest

at the rate of four per centum per annum from the time of the reception thereof by the Government.

By this section the Government is charged with four, instead of three per cent., as formerly, on unclaimed dividends.

76. If any balance remains of the estate of the Insolvent, or of the proceeds thereof, after the payment in full of all debts due by the Insolvent, such balance shall be paid over to the Insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the Judge.

Balance payable to insolvent.

Where the estate of the bankrupt is sufficient to pay twenty shillings in the pound, and a surplus still remains, interest should be allowed on all debts proved before the assignee, where the debt by express contract, or statutory enactment bears interest, or where a contract to pay it is to be implied, before the surplus is handed over to the bankrupt (*Re Langstaffe*, 2 Grant, 165).

OF LEASES.

77. If the Insolvent holds under a lease, property having a value above and beyond the amount of any rent payable under such lease, the Assignee shall make a report thereon to the Judge, containing his estimate of the value of the estate of the leased property in excess of the rent; and thereupon the Judge may order the rights of the Insolvent in such leased premises to be sold, after such notice of such sale as he shall see fit to order; and at the time and place appointed such lease shall be sold, upon such conditions, as to the giving of security to the lessor, as the Judge may order; and such sale shall be so made subject to the payment of the rent and to all the covenants and conditions contained in the lease, and all such covenants and conditions shall be binding upon the lessor and upon the purchaser, as if the purchaser had been himself lessee and a party with the lessor to the lease.

Lease more valuable than the rent to be sold: and subject to what conditions.

A covenant on the part of a lessee not to assign, &c., will not extend to an assignment by act of law. So that if the lessee become bankrupt, and the term pass to the assignees, it is not an assignment within the meaning of a

covenant not to assign (*Goring v. Warner*, 7 Vin. Abr. 85, pl. 9); and his assignee may afterwards assign it without license (*Doe v. Smith*, 5 Taunt. 795; *Doe v. Beavan*, 3 M. & S. 353).

Other cases
of lease,
how dealt
with.

78. If the Insolvent holds under a lease extending beyond the year current under its terms at the time of his insolvency, property which is not subject to the provisions of the last preceding section, or respecting which the Judge does not make an order of sale, as therein provided, or which is not sold under such order, the creditors shall decide at any meeting which may be held more than one month before the termination of the yearly term of the lease current at the time of such meeting, whether the property so leased should be retained for the use of the estate, only up to the end of the then current yearly term, or, if the conditions of the lease permit of further extension, also up to the end of the next following yearly term thereof, and their decision shall be final.

If the lessor
claims dam-
ages for re-
ceiving any
property
before the
end of the
lease.

79. From and after the time fixed for the retention of the leased property for the use of the estate, the lease shall be cancelled and shall from thenceforth be inoperative and null; and so soon as the resolution of the creditors as to such retention has been passed, such resolution shall be notified to the lessor, and if he contends that he will sustain any damage by the termination of the lease under such decision, he may make a claim for such damage, specifying the amount thereof under oath, in the same manner as in ordinary claims upon the estate, and the Assignee shall proceed forthwith to make an award upon such claim, in the same manner, and after similar investigation and with the same right of appeal, as is herein provided for in case of claims or dividends objected to.

How such
damages
shall be
estimated.

80. In making such claim, and in any award thereupon, the measure of damages shall be the difference between the value of the premises leased when the

lease terminates under the resolution of the creditors, and the rent which the Insolvent had agreed by the lease to pay during its continuance; and the chance of leasing or not leasing the premises again, for a like rent, shall not enter into the computation of such damages; and if damages are finally awarded to the lessor he shall rank for the amount upon the estate as an ordinary creditor.

81. The preferential lien of the landlord for rent in the Provinces of Ontario, New Brunswick or Nova Scotia is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment, or the issue of a Writ of Attachment under this Act, as the case may be, and from thence so long as the Assignee shall retain the premises leased.

Preferential
claim of
landlord
limited.

The preferential lien of the landlord in Ontario consisted in the power of distraining upon any goods of the insolvent, so long as they remained upon the leased premises, for arrears of rent. Until the introduction of this clause into the amending Act of 1865 (sec. 14), the landlord was entitled to distrain for six years' arrears, and a troublesome preference was destroyed by this limit of the right of distress to one year's arrears of rent.

OF APPEAL.

82. There shall be an appeal to the Judge from the award of an Assignee made under this Act, which Appeal shall be by summary application, of which notice shall be given to the opposite party and to the Assignee, within three days from the day on which the award is notified to the party complaining of it, and which shall be presented forthwith after the expiration of the delay required for notice of presentation; and the Assignee shall attend before the Judge at the time and place indicated in such notice, and shall produce before him all evidence, notes of evidence, books, or proved extracts from books, documents, vouchers, and papers having reference to the matter in dispute; and thereupon the Judge may

Appeal to
the Judge
from award
of assignee,
and proceed-
ings conse-
quent upon
it.

confirm such award, or modify it, or refer it back to the Assignee for the taking of evidence, by such order as will satisfy the ends of justice; and, pending any appeal, the Assignee shall reserve a dividend equal to the amount of the dividend claimed.

The notice of appeal must be one clear day's notice if the party to be served reside within fifteen miles of the place where the petition is to be heard; and one more day is to be allowed for each additional fifteen miles (see below, sec. 125).

Formerly, by the Act of 1864 (sec. 7, s. s. 1), this appeal was to be by "petition;" now the more general word "application" is used, which would include any form of presenting the facts to the Judge.

Appeal from
order of
Judge.

83. If any of the parties to any appeal, contestation, matter or thing upon which a Judge has made any final order or judgment are dissatisfied with such order or judgment, they may in the Province of Quebec move to revise the same or any appeal therefrom in like manner as from any final judgment of the Superior Court, to the Court of Queen's Bench on the appeal side thereof; in the Province of Ontario they may appeal therefrom to either of the Superior Courts of Common Law or to the Court of Chancery, or to any one of the Judges of the said Courts; in the Province of New Brunswick to the Supreme Court of New Brunswick or to any one of the Judges of the said Court; and in the Province of Nova Scotia to the Supreme Court of Nova Scotia or to any one of the Judges of the said Court; but any appeal to a single Judge in the Provinces of Ontario, New Brunswick or Nova Scotia may, in his discretion, be referred on a special case to be settled, to the full Court, and on such terms in the mean time as he may think necessary and just.

Judge may
refer it to
the full
Court.

The right of appeal, as provided by section seven of the Act of 1864, was limited to the single case of an order made by a judge of the Insolvent Court in deciding upon the award of an assignee.

Conditions
of Appeal.

84. Such appeal shall not be permitted, unless within five days from the day on which the order or

judgment is rendered, or on which, in the Province of Quebec the delay for moving to revise the same expires, if no motion in revision be made, the party desiring to appeal causes to be served upon the opposite party and upon the Assignee, an application in appeal, setting forth the proceeding before the Judge, and his decision thereon, and praying for its revision, with a notice of the day on which such application is to be presented, and also within the said period of five days causes security to be given before the Judge by ^{Security.} two sufficient sureties, that he will duly prosecute such appeal, and pay all costs incurred by reason thereof by the respondent.

It is not necessary that the petition in appeal should be signed by the party or his attorney. The service of notices of setting down for argument of the appeal is sufficient notice under this clause. The petition should be addressed to the court and not to the chief justice only. The neglect of the assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be a reason for enlarging the hearing and proceeding against the assignee for his neglect or contempt. Points not taken in the court below are not open to parties before the Appellate Court. The proper mode of raising technical objections to the proceedings in cases of this kind, is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits (*Re Parr*, 17 C. P. U. C. 621).

The sureties under this clause cannot be the solicitors for the appellants; the rule in the other courts is to be followed (*Re Owens*, 12 Grant, 564; and see *Panton v. Labertouche*, 1 Ph. 265; *Meyers v. Hutchinson*, 2 U. C. Prac. 380). The proper time to take objection to the sufficiency of the sureties is before the judge of the Insolvent Court, by analogy to proceedings in appeals from the county to the superior courts (Con. Stats. U. C., ch. 15, sec. 67, and *Re Owens*, *ubi supra*).

The length of notice to be given of the application for the allowance of the appeal is not specially provided for in this place, and the general provisions of sec. 125 must regulate it. There would seem to be a difficulty, however, in case the person served with notice had no solicitor, and resided some hundred miles from Toronto, where the application must be made. For one clear day's notice must in any case be given, and one extra day for every fifteen miles distance from the place where the proceeding is to be taken must be added, while only five days after judgment rendered are allowed to make the application. On account of this difficulty it has been deemed necessary to decide that according to the intention of the Act, if the service is within the eight days, the application may be for a day subsequent.

Where the notice was served in time, but named a day for the application, which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable in the discretion of the judge (*Re Owens*, 12 Grant, 446). The omission of the grounds of appeal in the notice is not an irregularity (S. C.)

Costs on appellant not proceeding according to his petition.

85. If the party appellant does not present his application on the day fixed for that purpose, the Court or Judge selected to be appealed to, as the case may be, shall order the record to be returned to the person or officer entitled to the custody thereof, and the party respondent may, on the following or any other day during the same term, produce before the Court, or within six days thereafter before the Judge, the copy of application served upon him, and obtain costs thereon against the appellant.

OF FRAUDS AND FRAUDULENT PREFERENCES.

Gratuitous contracts made within three months of insolvency presumed fraudulent and void.

86. All gratuitous contracts or conveyances, or contracts or conveyance without consideration, or with a merely nominal consideration, respecting either real or personal estate made by a debtor afterwards becoming an Insolvent with or to any person whomsoever, whether such person be his creditor or not, within three months next preceding the date of the Assignment, or of the issue of the Writ of Attachment in compulsory liquidation, and all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an Insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors.

The case of *Newton v. Ontario Bank* (13 Grant, 652 and 15 Grant, 283, in appeal), cast a doubt upon the application of section 8 of the Act of 1864, in cases of conveyances respecting real estate, and also in cases of dealings by the insolvent with strangers who are not creditors. This and the three following clauses are framed expressly to include dealings respecting real estate, and with persons not creditors of the insolvent.

Certain others voidable.

87. A contract or conveyance for consideration, respecting either real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant

of such inability, whether such person be his creditor or not, and before such inability has become public and notorious, but within thirty days next before the execution of a deed of Assignment or of the issue of a Writ of Attachment under this Act, is voidable, and may be set aside by any Court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court may order.

On 21st September, 1866, one S. transferred certain cheese to K. by delivering him warehouse receipts therefor. S. became insolvent on 19th October, and on the following day K. became aware of it. On 22nd October, K. executed a mortgage to the Bank of Montreal on this cheese. It was held that the subsequent insolvency of S., did not affect K.'s right respecting this property. This section did not apply as there was no evidence of obstructing or injuring creditors, but the contrary, the property having been sold at its full value. But even if the case fell within this clause, the contract would be voidable only, under the order of a competent tribunal, and no such order had yet been made, and would only be made upon such protective terms to the person from actual loss or liability as the court might direct (*The Bank of Montreal v. McWhirter*, 17 C. P. U. C. 506).

88. All contracts, or conveyances made and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration, or in contemplation of marriage.

All contracts made with intent to impede or defraud creditors, with the knowledge of party contracting, to be void.

An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors. Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent (*In*

re Colewerc, 1 L. R. Chy. 128; and see *Mercer v. Peterson*, 2 L. R. Ex. 304 affirmed, 3 L. R. Ex., ch. 105).

On a bill by a bankrupt, who had compounded with his creditors for eight shillings in the pound, and where bankruptcy had been annulled, the court set aside with costs, a secret bargain whereby the bankrupt agreed to pay one creditor in full, in consideration of his becoming surety for payment of the composition (*Wood v. Barker*, 1 L. R. Eq. 139; following *Jackman v. Mitchell*, 13 Ves. 581).

A mortgagor in embarrassed circumstances, in May, 1864, conveyed his equity of redemption in the mortgaged property, under pressure, to the mortgagee for a sum considerably less than its value, and in June following he was on his own petition adjudicated a bankrupt. On a bill filed by the assignee the deed was set aside (*Ford v. Olden*, 3 L. R. Eq. 461).

Questions will be likely to arise as to property given to a man, determinable in the event of his bankruptcy. A settlement of property to a man until he becomes bankrupt, and then over to his wife and children, has been held to be void so far only as it related to the property of the husband, it being considered as a fraud upon the bankrupt laws; but it would be valid as far as it related to the property of the wife (*Lester v. Garland*, 5 Sim. 205; Mon. 471). The construction of such provisions in wills or settlements depends entirely upon the exact nature and form of the trust or condition annexed to the bequest. The intention to prevent the property passing to the donee's assignees has frequently been frustrated by the erroneous way in which the instrument attempting to carry out such intention has been drawn. There seems to be nothing to prevent the creation of such a limitation or condition to an estate, as that it shall cease and be forfeited, and the interest pass to the bankrupt's wife and children, in the event of bankruptcy; but the object may be endangered by any attempt to combine with such limitation or condition a stipulation for maintenance, or any direct personal benefit continuing for the bankrupt (see *Tyrell v. Hope*, 2 Atk. 558; and *Lester v. Garland*, *ubi supra*).

Whatever interest the husband has by law in his wife's property, and has the power to dispose of, will pass to his assignees (see Com. Dig. Bankrupt, D. 12; *Mace v. Cadell*, Cowp. 232). The assignees of a husband in England are not allowed to reduce any of his wife's estate into possession in equity, without making a reasonable settlement upon the wife (see *Rankin v. Burnard* (5 Mad. 32; and Story's Eq. Juris., § 1412); but, as by our Married Women's Act, the husband is deprived of all right to reduce his wife's estate into possession, his assignees can claim no such power, even upon terms of making a settlement upon her.

A person in insolvent circumstances conveyed by way of settlement to his intended wife a lot of land, on which the settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in insolvency, the court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage or pay to the assignees the amount of such expenditure; and it subsequently appearing that her husband had created a mortgage prior to the settlement the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors (*Jackson v. Bowman*, 14 Grant, 156).

89. If any sale, deposit, pledge, or transfer be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any property real or personal, movable or immovable, goods, effects, or valuable security, be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the Assignee, in any Court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a Writ of Attachment under this Act, it shall be presumed to have been so made in contemplation of insolvency.

Fraudulent preferential sales, &c., to be void.

And presumed fraudulent, if made within a certain time before assignment, &c.

The effect of bankruptcy upon a fraudulent preference is not to divest the transferee of the property, but, notwithstanding the bankruptcy, it continues vested in the transferee, subject to be divested by the assignees at their election; and the commencement of an action of trover, which may be discontinued at any time, and which assumes that the goods came into the possession of the defendant lawfully, is not an election on the part of the assignee to avoid the transfer. Therefore, where goods had been transferred by a trader before his bankruptcy by way of fraudulent preference, and the transferee, after the appointment of the assignees, had brought an action against a third party for an illegal and excessive distress upon the goods so transferred, the defendant could not set up the bankruptcy as a defence, when the assignees had done no other act in assertion of their rights than commencing an action of trover for the same goods (*Newnham v. Stevenson*, 15 Jur. 860; 20 L. J. C. P. 111).

Acts which constitute fraudulent preferences under this section not only render the transfer null and void, but may (sec. 101 *infra*) be the ground for refusing the discharge of the insolvent; and even when the fraudulent preferences were created before the passing of the Act of 1864 (*Re Owens*, 12 Grant, 560). This section does not invalidate conveyances executed before the Act passed, and which were valid at the time of their execution (*Gordon v. Young*, 12 Grant, 318).

An insolvent absconded to the United States taking money with him. He was followed there by the agent of a person in this country, who had become surety for him, and by the threats of criminal proceedings induced him to pay the amount of the debt. A bill filed by the official assignee to recover the money from the surety, was dismissed with costs (*Roe v. Smith*, 15 Grant, 344). Every chattel mortgage made by an insolvent, within thirty days before a voluntary assignment is not necessarily void under this section

when taken in the way of business, in an ordinary transaction and where the mortgagee has no reason to suspect that the mortgagor contemplated insolvency. One J. being a retail dealer, and wanting goods to carry on his business, asked one M. to endorse notes to enable him to purchase them. To this M. consented on condition that J. on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise M. might sell the goods for his own protection. M. accordingly endorsed, and J. with the notes purchased goods which he mortgaged to M. as agreed on, with other goods, for the *bonâ fide* and sole consideration of perfecting the said agreement. J. afterwards, and within thirty days from the date of the mortgage, but without M.'s consent, made a voluntary assignment to an official assignee. This mortgage was upheld as against the assignee, and in giving judgment Hagarty, C. J., remarks: "It was a very natural, and possibly highly beneficial arrangement for the trader to make, at least so far as it was possible for M. to foresee. Its effect might be, as is remarked in many of the cases, to delay creditors, but that alone does not avoid a transaction otherwise lawful, nor are we prepared to hold that the mere fact that the trader contemplated insolvency will alone defeat the remedy and security of a person dealing with him as M. seems to have done, in the way of business, in an ordinary transaction, and having no reason whatever to suspect what may be passing in the trader's mind" (*Mathers v. Lynch*, 27 Q. B. U. C. 244).

To avoid a transaction under this section, not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor, to whom the transfer or payment is made over the other creditors. In the case cited below the insolvent, about two months before the issue of a writ of attachment against him, assigned to defendant, a creditor, a policy of insurance upon certain merchandise, in security for a debt which was about to be placed in suit, and the insurance company, upon the occurrence of a fire, paid over the proceeds of the policy to the creditor, to the extent of the debt received thereby. At the trial the plaintiff, who claimed, as assignee, to recover back this amount, called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency, that his intention was, with his remaining assets and the residue of the money derived from the policy, after paying defendant, to re-open his business, but that he was driven into insolvency by the act of a certain creditor, who though he had promised him time, sued out a writ of attachment against him.

It was held that the transfer of the policy not having been made within thirty days of the issue of the writ of attachment, the onus was cast upon the plaintiff of proving that the transfer was made in contemplation of insolvency, and that the above facts were insufficient to sustain that contention.

The test to determine whether a transaction is void under this section, is precisely the same as is applied under the English bankrupt law to determine whether a transaction is void, as being by way of fraudulent preference (*McWhirter v. Thorne*, 19 C. P. U. C. 302).

On the 25th November, 1864, an agreement was made by one S. to deliver certain timber at prices payable partly before and partly on delivery. On the 14th December following S. assigned the timber to a mortgagee as security for certain advances. The mortgagee wrote to the purchaser that S. desired to deliver the timber to him but was in difficulty, that some of the creditors refused to wait until he could complete his contract, and had commenced actions, and recommending the purchaser to anticipate their action by taking a

delivery before they could interfere. On the 11th of March the purchaser accordingly paid the mortgagee's claim and took a delivery. On 14th April S. made an assignment under the Insolvent Act of 1864. He admitted that he was insolvent on the 11th March, and long previous, though he said he did not then know it, and had not informed the purchaser of it. It was held that these facts shewed the delivery to the purchaser to be a transfer by S., "in contemplation of insolvency," the effect of which was to give him "an unjust preference" over the other creditors, and that it was therefore void under this section (*Adams v. McCall*, 25 Q. B. U. C. 219).

90. Every payment made within thirty days next before the execution of a deed of assignment, or the issue of a Writ of Attachment under this Act, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, is void, and the amount paid may be recovered back by suit in any competent Court, for the benefit of the estate; Provided always that if any valuable security be given up in consideration of such payment, such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded.

Payments made under certain circumstances by a debtor to be void.

Preferential transfers have not been to any great extent the subject of legislation in England, but they are deemed void by the Courts as being a fraud upon the bankrupt laws (*Crosby v. Couch*, 2 Camp. 166; 11 East. 256; *Alderson v. Temple*, 4 Burr. 2235; 1 W. Bl. 660). Although the period of thirty days before, &c., is given in this section, as the time in which a payment made by a debtor unable to meet his engagements to a person cognizant thereof, would be void, there can be little doubt that, under English authorities, preferential payments made before that time may be held void as being against the spirit of, and a fraud upon, the Act. It has been held that if a party voluntarily make a payment, by which the equal distribution of his property in bankruptcy will be defeated, such payment is a fraudulent preference, though the bankrupt in making it did not intend to benefit, and in fact did not benefit the particular creditor. For instance, where a bankrupt paid off a mortgage on property settled to the use of his wife, who had joined in such mortgage, without previous notice to, or request by the creditor, to whom it would have been equally beneficial to retain the mortgage, the bankrupt intending only by such payment to liberate his wife's property for his own and her benefit; this has been, nevertheless, held to be a fraudulent preference (*Marshall v. Lamb*, 5 Q. B. 115; 7 Jur. 850). The mortgage, however, would come under the description of valuable securities in this clause, and the creditor would be entitled to have it restored.

The words of this section, as they stand, would seem to apply to all payments made within thirty days, and to render them void whether made voluntarily or under the compulsion of a *bond fide* creditor. It would be against the spirit of the cases on the point, however, if a payment made

under the pressure, for instance, of a law suit should be held void if made within that period (see *DeTastet v. Carroll*, 1 Stark. 88; *Ex parte DeTastet*, Mon. 138, 153; *Atkins v. Seward*, Mannings Index, 62 pl. 181; *Thompson v. Freeman*, 1 T. R. 155; *Kinnear v. Johnstone*, 2 F. & F. 753; *Pennell v. Heading*, 2 F. & F. 744, Erle C. J.)

Transfers
of debts of
insolvent
within
thirty days
of his in-
solvency to
his debtors
to enable
them to set-
off, void.

91. Any transfer of a debt due by the Insolvent, made within thirty days next previous to the execution of a deed of Assignment or the issue of a Writ of Attachment under this Act, or at any time afterwards, to a debtor knowing or having probable cause for believing the Insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is null and void as regards the estate of the Insolvent; and the debt due to the estate of the Insolvent shall not be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor.

Purchasing
goods on
credit, &c.,
by person
knowing
himself un-
able to pay,
how punish-
able.

92. Any person who purchases goods on credit or procures advances in money, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, or who by any false pretence obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods, wares or merchandize, with intent to defraud the person thereby becoming his creditor, and who shall not afterwards have paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt or costs be sooner paid; and if such debt or debts be incurred by a partnership, then every member thereof who shall have known of the incurring, and of the in-

If by a firm.

tention to incur, such debt or debts, shall be similarly liable; provided always, that in the suit or proceeding ^{Providio.} taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

Under section 8, sub-sec. 7, Act of 1864, from which this section is taken, when a trading company contracted these fraudulent debts every member thereof, who did not prove himself to have been ignorant of the incurring and of the intention to incur such debts was liable to punishment. By the alteration in this section each of the members of a firm are not *primâ facie* liable, but a case must be established against them.

In addition to inflicting a severe punishment upon the insolvent under this clause, the creditors may take advantage of his conduct for the purpose of opposing his discharge (sec. 101 *infra*); and the misconduct need not be shewn to have occurred since the passing of the Act of 1864 (*Re Owens*, 12 Grant, 560).

When a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade, according to circumstances: continuing his business may be a fraud, but it is not necessarily so, and may not disentitle him to his discharge (*Re Robert Holt and John Gray*, 13 Grant, 568). In another case Mr. Justice Adam Wilson says:—"The mere fact of a trader purchasing goods who is at the time unable to meet his engagements, is neither fraud nor within the provisions of the Insolvent Act. A purchase may under such circumstances be the very best and wisest act which the trader could do, and may be the most beneficial act for his creditors. Such a purchase may be the very means of reinstating him, and relieving him from difficulty. Inability to pay is no more fraud, though it was thought so in former times when bankruptcy was esteemed a crime, than solvency is honesty, though some may think it so" (*In re Garratt & Co.*, 28 Q. B. U. C. 266).

The language of this section referring to the insolvent's "knowing or believing himself to be unable to meet his engagements, when he purchases goods on credit or procures advances in money," is much the same in terms and meaning as the words in the 159th section of the English Act of 1861. This latter section declares the insolvent to be guilty of a misdemeanor, if the court is of opinion "that he could not have had, at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same." The *onus* of proving this offence is upon the opposing creditor. He may support his case by examining the insolvent in reference to his state of embarrassment at the time of contracting any particular debt, and also may investigate his accounts, which shew the profits made and any other income he may have received in such year, and whether it was increasing or diminishing. The extent of the insolvent's liabilities in any given year, may also be easily ascertained. On his examination he may be pressed closely by counsel with such questions as the following:—Is any creditor pressing him? Has any writ been issued against him? Has he made or endorsed any notes after he had failed to meet others? Has he become security, or entered into pecuniary engagements for others, when he could not pay his own debts? How many accommodation notes

has he made or endorsed? Has he any means of payment in the event of the other party or parties to these notes failing to meet them, and himself being called upon to do so? Lord Cranworth held (*In Re Marks*, 1 L. R. Chy. 334), under the circumstances of the case, that the bankrupt had not contracted a debt without any reasonable or probable ground of expectation of being able to pay it, although he obtained goods on credit while insolvent, and soon afterwards sold them for less than their cost price. The cases go to shew that the court will form its judgment as to the insolvent's expectations of being able to pay any debt at the time he contracted it from a general view of his income, earnings and property on the one hand, and the liabilities hanging over him on the other. He must appear to have contracted new debts after manifold proof given of his incapacity to liquidate existing demands upon him. Allowance will also be made for a fair prospect of professional exertions, or commercial enterprise, for the reasonable hopes of assistance from friends, and many other contingencies of life. In cases of doubt, the character of the debt will also be considered, as to whether it was contracted for luxuries or the necessary support of the insolvent's family, or in the ordinary course of trade. It cannot be contended that a man must leave off trade because he is in difficulties; and the system of trade in this country is so thoroughly based upon credits, that no trader in the Dominion at all in difficulties could carry on trade without "purchasing goods on credit, or procuring advances in money (see *Ex parte Johnson*, 4 De G. & S. 25; *Ex parte Dornford*, 4 De G. & S. 29; *Ex parte Rufford*, 2 D. M. & G. 234; *Ex parte Dobson*, 6 D. M. & G. 781; *Ex parte Selby*, 6 D. M. & G. 783; *Ex parte Brundrit*, *In re Caldwell*, 3 L. R. Chy. 26; *Ex parte Bayley*, *In re Ainsworth*, 3 L.R. Chy. 244).

Overdrawing an account current at a banker's by a person in insolvent circumstances, does not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay the same (*Ex parte Harrison*, 2 L. R. Chy. 195).

Fraud must be proved.

Award of imprisonment.

Proviso.

93. Whether the defendant in any such case appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it, if the trial be before a jury, the Judge who tries the suit or proceeding shall immediately after the verdict rendered against the defendant for such fraud (if such verdict is given), or if not before a jury, then immediately upon his rendering his judgment in the premises, adjudge the term of imprisonment which the defendant shall undergo; and he shall forthwith order and direct the defendant immediately to be taken into custody and imprisoned accordingly; but such judgment shall not affect the ordinary remedies for the revision thereof, or of any proceeding in the case.

OF COMPOSITION AND DISCHARGE.

94. A deed of composition and discharge, executed by the majority in number of those of the creditors of an Insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three fourths in value of the liabilities of the Insolvent subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him and upon them, as if they were also parties to it; and such a deed may be invoked and acted upon under this Act although made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent; the whole subject to the exceptions contained in section one hundred of this Act.

Deed of composition, and executed by a certain proportion of creditors to bind all.

The English Act of 1861, sec. 192, contains provisions very similar to this Act, relating to deeds of composition and discharge. Under it a deed of composition contained a clause that the creditors did release all actions and contracts whatsoever, which the creditors then had, or which they at any time thereafter might have against the bankrupt, by reason or on account of any debt or debts or contracts from the beginning of the world to the day of the date of the deed. It was held that the release was not unreasonable inasmuch as it must be taken to be restrained by the whole scope and object of the deed, and confined to causes of action which could be proved by a creditor in bankruptcy (*Huselgrove v. John House*, 1 L. R., Q. B. 101).

The power given to a majority of creditors assenting to a deed of composition, to bind the non-assenting minority, is a statutory power, and must be exercised *bond fide* for the benefit of all creditors. If, therefore, there is a fraudulent bargain for the benefit of some of the creditors, or if the majority of the creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the court will hold the deed not to be binding on a non-assenting creditor. But if the assenting majority appear to have exercised their discretion *bond fide* for the benefit of the creditors the court will not sit in review on the *quantum* of the composition (*In re Cowen*, 2 L. R. Chy. 563; and see *Ex parte Roots*, 2 L. R. Chy. 559).

A person who carried on business in partnership executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite statutory majority of separate creditors. The firm was also indebted, and it was held that the deed was not binding on a dissenting separate creditor, for it should have provided for all classes of the insolvent's creditors (*Ex parte Glen*, 2 L. R. Chy. 670; and see *Thompson v. Knight*, 2 L. R. Ex. 42; *Tetley v. Wanless*, 2 L. R. Ex. 21 & 275).

As to a claim against a debtor for unliquidated damages not constituting the holder of the claim a creditor within the meaning of the English Act of

1861 (see *Ex parte Wilmot, In re Thompson*, 2 L. R. Chy. 795; *Hoggarth v. Taylor*, 2 L. R. Ex. 105; *Sharland v. Spence*, 2 L. R. C. P. 456; *Robertson v. Goss*, 2 L. R. Ex. 396).

A deed which is assented to by the required majority of creditors cannot be unreasonable, unless it gives them some advantage over the minority (*In re Richmond Hill Hotel Co., Ex parte King*, 4 L. R. Eq. 566; affirmed on appeal, 3 L. R. Chy. 10). An insolvent executed a deed of composition, paying 10s. in the pound. Some of the creditors declined to assent, but subsequently being informed that the required number had executed, they took the amount of the instalments remitted to them and said nothing. The deed was afterwards decided to be void for want of a strict compliance with the statute, but the dissenting creditors were held to be precluded from suing the insolvent for the balance of their debt; as the mistake, if any, under which they had received the instalments was one of law, and not of fact (*Kitchen v. Hawkins*, 2 L. R. C. P. 22).

A deed of composition under the English Act of 1861, sec. 192, is a bar to an execution issued against a garnishee under an order pursuant to the garnishee clauses of the Common Law Procedure Act, to the same extent that it is a bar to an execution on a judgment (*Kent v. Tomkinson*, 2 L. R. C. P. 502).

The assent of creditors in writing is all that the English Act of 1861, sec. 192, required; whereas our clause requires the execution of the deed itself by the creditors. In an English case it has been held that the creditors' assent may be given before the deed is executed or even prepared (*Rutty v. Denthall*, 2 L. R. C. P. 488).

A deed of composition made between the members of a partnership and the joint creditors of the firm, without any reference to the separate creditors of the different members of the firm, is invalid (*Tomlin v. Dutton & Miller*, 3 L. R. Q. B. 466; and see *Rixon v. Emary*, 3 L. R. C. P. 546).

Where a non-assenting creditor sues a debtor, who has executed a composition deed containing a release, for a debt due before the execution of the deed and the debtor neglects to plead the deed, he is estopped from afterwards setting up the release to defeat the execution (*Rossi v. Bailey*, 3 L. R. Q. B. 621).

A composition deed under the English Act of 1861, between an insolvent and his two partners, of the one part, and certain trustees on behalf of the undersigned creditors of the insolvent and his two partners, of the other part, by which all the estate and effects of the insolvent and his two partners were assigned by the insolvent and his two partners for the benefit of the creditors of the insolvent and his two partners, affords no answer on equitable grounds to an action against the insolvent by a creditor for his separate debt (*European Central Railway Co. v. W. B. Westall*, 1 L. R. Q. B. 167); and see as to effect of composition deeds to bind non-assenting creditors, and as to what are reasonable provisions in such deeds (*Buvelot v. Mills*, 1 L. R. Q. B. 104; *Bond and another v. Weston*, 1 L. R. Q. B. 169; *Gresty v. Gibson*, 1 L. R. Ex. 112; *Reeves and another v. Watts*, 1 L. R. Q. B. 412; *Coles v. Turner*, 1 L. R. C. P. 373; *Brooks v. Jennings*, 1 L. R. C. P. 476; *Blumberg v. Rose*, 1 L. R. Ex. 232; *Greenberg v. Ward*, 1 L. R. C. P. 585; *Jacobson v. Lamert*, 2 L. R. Ex. 394; *McLaren v. Baxter*, 2 L. R. C. P. 559; *Isaacs v. Green*, 2 L. R. Ex. 352; *Bailey v. Bowen*, 3 L. R. Q. B. 133; *Fitzpatrick v. Bourne*, 3 L. R. Q. B. (Ex. ch.) 233; *Sowry v. Law*, 3 L. R. Q. B. 281). A provision which makes the composition payable on the trustees' certificate, that the

deed has been assented to by the statutory number of creditors, is unreasonable (*Bolnois v. Mann*, 1 L. R. Ex. 28; and see as to what are unreasonable provisions, *Giddings v. Penning*, 1 L. R. Ex. 325; *Latham v. Lafone*, 2 L. R. Ex. 115; *Baker v. Painter*, 2 L. R. C. P. 492; *Oldis v. Armston*, 2 L. R. Ex. 406; *Wigfield v. Nicholson*, 3 L. R. Q. B. 450).

The deed of composition referred to in this clause may be validly made either before, pending, or after proceedings under this Act. Yet the facilities for having it executed by the proper proportion of creditors are very different at these different times. It may be no easy matter for an insolvent always to ascertain the exact number and value of his creditors with sufficient accuracy to satisfy the assignee that the deed has been executed by the requisite proportion. If the period of two months, allowed to creditors to bring in their claims, has elapsed, there will be very little difficulty in telling whether the deed has been properly executed or not.

This section, from analogy to decisions upon the English Act, would seem not to be retrospective so as to bring within its provisions a deed of composition executed before the statute came into operation, as against a creditor who had not executed it (*Marsh v. Higgins*, 19 L. J. C. P. 297); but it would probably apply to instruments entered into, but inchoate, at the time of the Act coming into force, and since completed (*Waugh v. Middleton*, 8 Ex. 352; 22 L. J. Ex. 109; *Larpent v. Bibby*, 24 L. J. Q. B. 301).

An unreasonable provision in a composition deed will render it invalid against non-assenting creditors (*Balden v. Pell*, 10 L. T. Rep. (N.S.) 493; and see *Armitage v. Baker*, 10 L. T. Rep. (N.S.) 526; *Hidson v. Barclay*, 10 L. T. Rep. (N.S.) 587; *Woods v. Foote*, 1 H. & C. 841, in error; *Leigh v. Pendlebury*, 10 Jur. (N.S.) 296).

A composition deed by which the creditors are entitled to the composition only on signing is bad (*Martin v. Gribble*, 13 W. R. 691). In determining whether the requisite majority in value of the creditors have assented to a composition deed, the value of the securities held by them is not to be deducted from the debts of the secured creditors (*Whittaker v. Lowe*, 13 W. R. 723). A deed of composition and discharge, purporting to be between the insolvents, of the first part, and a majority of the creditors of \$100 and upwards, of the second part, was held invalid because not executed by the insolvent. Such a deed to be operative must provide for the separate creditors of each partner, as well as those of the firm (*In re Garratt & Co.*, 28 Q. B. U. C. 266).

By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Insolvent Act. It was held that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency, the creditor was entitled to prove for the whole debt (*In re McRae*, 15 Grant, 408).

Trustees of a composition deed, before they allow a creditor to sign, are bound to ascertain the validity of his claim, as by signing he becomes a *cestui que trust*, and the trustees, except in cases of fraud, are bound to pay such dividends as may be declared (*Lancaster v. Elice*, 31 L. J. Chy. 789; 8 Jur. (N.S.) 1167).

It was formerly held under the English Acts, whose provisions are somewhat analogous in this respect to those of our own act, that a deed of assignment was not binding on a creditor who had not executed it, unless such deed provided for the distribution of *the whole* of the debtor's effects (*Tetley v. Taylor*, 1 El. & Bl. 532; 17 Jur. 130; *Fisher v. Bell*, 12 C. B. 363). The Chancellor (Lord Westbury) has recently settled the conflicting decisions upon this point. He has decided that a complete *cessio bonorum* is not indispensable to the validity of such a deed as against non-assenting creditors (*Ex parte Morgan*, 7 L. T. Rep. (N.S.) 730; and see *Ex parte Rawlings*, 7 L. T. Rep. (N.S.) 582).

Form and
effect of
such deed.

If it be con-
ditional up-
on payment
of the com-
position.

95. Such deed of composition and discharge may be so made either in consideration of a composition payable in cash, or on terms of credit, or partially for cash and partially on credit; and the payment of such composition may be secured or not according to the pleasure of the creditors signing it; and the discharge therein contained may be absolute, or may be conditional upon the condition of the composition being paid; and such deed may contain instructions to the Assignee as to the manner in which he is to proceed, and to deal with the estate and effects of the Insolvent, subsequent to the deposit of such deed with him, which instructions shall be obeyed by the Assignee; but if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the Assignee shall immediately resume possession of the entire estate and effects of the Insolvent in the state and condition in which they shall then be; but the creditors holding claims which were provable before the execution of such deed shall not rank, vote or be computed as creditors concurrently with those who have acquired claims subsequent to the execution thereof for any greater sum than the balance of composition remaining unpaid; but after such subsequent creditors shall have received dividends to the amount of their claims, then such original creditors shall have the right to rank for the entire balance of their original claims then remaining unpaid, and shall be computed for all purposes

for which the proportions of creditors require to be ascertained, as creditors for the full amount of such last-mentioned balance.

96. The re-conveyance by the Assignee to the Insolvent, or to any person for him, of any part of his estate or effects, whether real or personal, if made in conformity with the terms of a deed of composition and discharge, shall have the same effect (except as the same may be otherwise agreed by the conditions of such deed or re-conveyance), as if such property had been sold by the Assignee in the ordinary course, and after all the preliminary proceedings, notices and formalities herein required for such sale; and if such deed of composition and discharge be contested, and pending such contestation, any payment or instalment of the composition falls due under the terms of such deed, the payment thereof shall be postponed till after the expiration of ten days after final judgment upon such contestation; and if proceedings for revision or appeal be commenced, then until after the expiration of ten days after the judgment in revision or in appeal, as the case may be, and the deed of re-conveyance need not contain any further or more special description of the effects and property re-conveyed than is required to be inserted in the deed of assignment, and may be enregistered in like manner and with like effect.

Deed of re-conveyance by assignee to Insolvent. Its effect.

If it be contested, and a payment of composition during the contestation. Form and registration of deeds.

The two preceding sections are quite new, and contain useful provisions of a practical kind, relating to the terms and conditions of composition deeds and the re-conveyance by the assignee to the insolvent.

97. If the Insolvent procures and deposits with the Assignee a deed of composition and discharge, duly executed as aforesaid, the Assignee shall immediately give notice of such deposit by advertisement; and if opposition to such composition and discharge be not made by a creditor within three judicial days after the

Duty of Assignee receiving a deed of composition.

last publication of such notice, by filing with the Assignee a declaration in writing that he objects to such composition and discharge, the Assignee shall act upon such deed of composition and discharge according to its terms; but if opposition be made thereto within the said period, or if made, be not withdrawn, then he shall abstain from taking any action upon such deed until the same has been confirmed, as hereinafter provided.

By sec. 9, sub-sec. 2, Act of 1864, the creditors had *six* days after the last publication to oppose the discharge: this section abridges the time to three days.

Effect of consent of proper number of creditors to a discharge.

98 The consent in writing of the said proportion of creditors to the discharge of a debtor absolutely frees and discharges him, after an assignment, or after his estate has been put in compulsory liquidation, from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and provable against his estate, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shewn by any supplementary list of creditors furnished by the Insolvent, previous to such discharge, and in time to permit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the Assignee, whether such debts be exigible or not at the time of his insolvency, and whether the liability for them be direct or indirect; and if the holder of any negotiable paper is unknown to the Insolvent, the insertion of the particulars of such paper in such statement of affairs or supplementary list, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section.

As to holders of negotiable paper unknown to Insolvent.

A consent to a discharge of an insolvent is operative even without an assignment, provided the insolvent makes and files an affidavit that he has no estate or effects to assign (*Re Perry*, 2 L. J. U. C. (N.S.) 75).

A discharge under this Act will not prevent a party from being committed upon a judgment summons under the provisions of the Division Courts Act. A party applying for protection from arrest should shew clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there (*In re Mackay et al. v. Goodson*, 27 Q. B. U. C. 263).

The court set aside, with costs, a *fi. fa.* lands issued on 7th June, 1865, and renewed from time to time until 4th June, 1867, in a case where defendant obtained his discharge on 30th March, 1867. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so (*Dickinson v. Bunnell*, 19 C. P. U. C. 216).

99. A discharge without composition under this Act, whether consented to by any creditor or not, shall not operate any change in the liability of any person secondarily liable to such creditor for the debts of the Insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any partner or other person liable jointly or severally with the insolvent to such creditor for any debt; nor shall it affect any mortgage, hypothec, lien or collateral security held by any such creditor as security for any debt thereby discharged.

Discharge without composition not to affect secondary liabilities.

The words "without composition" in this section are new.

100. A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for the maintenance of a parent, wife or child, or as a penalty for any offence of which the insolvent has been convicted, unless the creditor thereof shall file or claim therefor; nor shall any such discharge apply without such consent, to any debt due as a balance of account due by the insolvent as an Assignee, tutor, curator, trustee, executor or administrator under a will, or under any order of court, or as a public officer; nor

Discharge under this Act not to apply to certain debts, or liabilities.

shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act; but the creditor of any debt due as a balance of account by the insolvent as assignee, tutor, curator, trustee, executor, administrator or public officer may claim and accept a dividend thereon from the estate without being, by reason thereof in any respect affected by any discharge obtained by the insolvent.

Sec. 5, sub-sec. 9, Act of 1864, from which this clause is mainly taken, excepted all debts due as damages for personal wrongs from the operation of a discharge, without specifically enumerating the character of the torts. Where an executor has become bankrupt or insolvent, so as not to have the means, or refuses to act, the Court of Chancery will permit a creditor to bring a bill himself against persons accountable to the estate and have administration (*Burroughs v. Elton*, 11 Ves. 29).

Confirmation of discharge, and on what conditions it shall be granted.

101. An insolvent who has procured a consent to his discharge or the execution of a deed of composition and discharge, within the meaning of this Act, may file in the office of the court the consent or deed of composition and discharge, and may then give notice (Form N) of the same being so filed, and of his intention to apply by petition to the Court in the Provinces of Quebec or Nova Scotia, or in the Provinces of Ontario or New Brunswick to the Judge, on a day named in such notice (which however shall not be before the day on which a dividend may be declared under this Act), for a confirmation of the discharge effected thereby; and such notice shall be given by advertisement in the official *Gazette* for one month, and also for the same period, if the application is to be made in the Province of Ontario, New Brunswick or Nova Scotia, in one newspaper, and if in the Province of Quebec, in one newspaper published in French, and in one newspaper published in English,

in or nearest the place of residence of the insolvent ; and upon such application, any creditor of the insolvent or his Assignee under the authority of the creditors, may appear and oppose such confirmation, either upon the ground of fraud or fraudulent preference within the meaning of this Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, as the case may be, or of the insufficiency in number or value of the creditors consenting to or executing the same, or of the fraudulent retention and concealment by the insolvent of some portion of his estate or effects, or of the evasion, prevarication or false swearing of the insolvent upon examination as to his estate and effects, or upon the ground that the insolvent has not kept an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade, or, that having at any time kept such book or books, he has refused to produce or deliver them to the Assignee, or that he is wilfully in default to obey any provision of this Act, or any order of the Court or Judge ; and if any of the said grounds be proved, the confirmation of his discharge shall be refused and such discharge set aside and annulled ; but in the Provinces of Ontario and Quebec, the omission to keep such books before the coming into force of the Insolvent Act of 1864, and in the Provinces of New Brunswick and Nova Scotia, such omission previous to the coming into force of this Act, shall not be a sufficient ground for contesting the confirmation of the discharge of an Insolvent ; And provided further that any act on the part of the Insolvent, which might be held to be an act of fraud or fraudulent preference within the meaning of the Insolvent Act of 1864, or this Act, but which would not amount to fraud if the said Act or this Act had not been passed, shall not be

Creditors or Assignees may oppose on certain grounds.

Proviso ; as to non-keeping of certain books.

Further provisions as to acts of fraud or preference, committed before certain periods.

a ground for contesting the confirmation of the discharge of any Insolvent, if such act was done by the Insolvent, in the Province of Ontario or Quebec, before the coming in force of the Insolvent Act of 1864, or in the Province of Nova Scotia or New Brunswick, before the coming into force of this Act.

The provisions contained in this section under which creditors may oppose the discharge of an insolvent on the ground of fraud or fraudulent preference are of wide application. This discharge is effectual to wipe out liabilities whenever incurred, whether before or since the passing of the Act of 1864 ; and it is only reasonable that the conduct of the insolvent in connection with the incurring of these same liabilities should be closely scrutinized upon his application for discharge, although such investigation may carry the enquiry back to an earlier date than 1864.

Where a trader, whose whole property was heavily mortgaged, and who had large overdue debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth \$4,000 more than he owed, and that he had no engagements he could not meet, he was held to be guilty of such fraud as disentitled him to his discharge under the Act, although committed before 1864 (*Re Owens*, 12 Grant, 560 ; and see *Re Staner*, 2 DeG. McN. & G. 263). It would seem that no other grounds than those set out in this clause can be taken in opposition to the confirmation of a discharge obtained by consent of creditors (*Re Holt and Gray*, 13 Grant, 568).

The neglect to keep proper books of account is a most serious breach of duty, causing great possible injury to creditors, and tending to raise strong distrust of the integrity of the debtor ; and Mr. Chief Justice Hagarty says (*In re Lamb*, 4 Prac. & Chr. Reps. U. C. 21) that "it would be well always to punish such a breach of duty in a severe and exemplary manner."

If the insolvent does not file the consent or deed, for confirmation within a certain time, a creditor may notify him to do so, and apply for an order annulling the deed.

102. If the insolvent does not deposit such consent or such deed of composition and discharge, as the case may be, in the court, and give notice of his application for a confirmation of such discharge, within one month from the time at which the same has been effected under this Act, and proceed therewith thereafter according to such notice, any creditor for a sum exceeding two hundred dollars, may cause to be served a notice in writing upon the insolvent, requiring him to file in the Court the consent, or the deed of composition and discharge, as the case may be ; and may thereupon give one month's notice to the Insolvent (Form O) of his intention to apply by petition to the

Court or Judge who has authority under this Act to confirm such discharge, on a day named in such notice, for the annulling of the discharge; and on the day so named may present a petition to the Court or Judge, in accordance with such notice, setting forth the reasons in support of such application, which may be any of the reasons upon which a confirmation of discharge may be opposed; and upon such application, if the insolvent has not at least one week before the day fixed for the presentation thereof, filed in the office of the court the consent or deed under which the discharge is effected, the discharge shall be annulled without further inquiry except as to the service upon him of the notice to file the same; but if such consent or deed be so filed, or if, upon special application, leave be granted him to file the same at a subsequent time, and he do then file the same, the Court or Judge, as the case may be, shall proceed thereon as upon an application for confirmation of such discharge.

Proviso; if
the deed be
filed.

It is to be observed that the language of this section is that the discharge "*shall* be annulled" if the insolvent does not file his consent or deed. Formerly (sec. 9, sub-sec. 7, Act of 1864) the expression in this place was "*may* be annulled," &c.

103. The Court or Judge, as the case may be, upon hearing the application for confirmation of such discharge, the objections thereto, and any evidence adduced, shall have power to make an order, either confirming the discharge or annulling the same according to the effect of the evidence so adduced; but if such evidence should be insufficient to sustain any of the grounds hereinbefore detailed as forming valid grounds for contesting such confirmation, but should nevertheless establish that the Insolvent has been guilty of misconduct in the management of his business, by extravagance in his expenses, recklessness in endorsing or becoming surety for others, continuing his trade unduly after he believed himself to be insol-

Powers of
Court or
Judge on
application
for confirm-
ation of dis-
charge, &c.

X

vent, incurring debts without a reasonable expectation of paying them (of which reasonable expectation the proof shall lie on him, if such debt was contracted within thirty days of an assignment or the issue of a Writ of Attachment); or negligence in keeping his books and accounts; or if such facts be alleged by any contestation praying for the suspension of the discharge of the Insolvent, or for its classification as second class, the Court or Judge may thereupon order the suspension of the operation of the discharge of the Insolvent for a period not exceeding five years, or may declare the discharge to be of the second class, or both, according to the discretion of the Court or Judge.

This power of classifying the discharge of an insolvent is new, although by the Act of 1864 (sec. 9, sub-secs. 8 and 12) the discharge might be granted absolutely, suspensively or conditionally.

Under the Act of 1864, although a discharge might be given conditionally or suspensively, yet when the condition was fulfilled, or the time of suspension had expired, all orders of discharge possessed the same value, and there were among them no classifications, or meritorious or degrading distinctions whatever. The legislature followed in this the English Act of 1861, which materially altered the law on the point by abolishing the classification of certificates of discharge that existed under the provisions of 12 & 13 Vic. c. 106. By that Act the commissioner had to certify as to the cause of bankruptcy—either that the bankruptcy had arisen from unavoidable losses and misfortunes, in which case the certificate was designated as of the first class; or that the bankruptcy had not wholly arisen from unavoidable losses and misfortunes, in which case the certificate was designated as of the second class; or that the bankruptcy had not arisen from unavoidable losses and misfortunes, in which case the certificate was designated as of the third class. To this last class a certain stigma was deservedly attached; while a first class certificate was justly prized by its possessor as a passport by which he might again enter into business with an untarnished reputation for honesty at least. The reason given for the change was the uncertainty and capriciousness with which the several judges gave the different classes of certificates; but the wisdom of the step has been very much questioned in England, and it has now been retraced in Canada.

An order of discharge may be granted subject to any condition touching any salary, pay, emoluments, profit, wages, earnings, or income which may afterwards become due to the bankrupt, and touching after acquired property of the bankrupt (*Re Anderson*, 6 L. T. Rep. (N.S.) 837, Bank.; *Re Inman*, 6 L. T. Rep. (N.S.) 665, Bank.) It seems that it is not in the discretionary power of the Court to refuse or suspend the order of discharge, when the bankrupt has not been guilty of conduct amounting to a fraud under this Act (see *Ex parte Udall*, *Re Mew*, 6 L. T. Rep. (N.S.) 732, Ch. on appeal; *Ex parte Glass and Elliott*, *Re Boswall*, 6 L. T. Rep. (N.S.) 407).

Much the same effect as a refusal of a discharge has been obtained in England by an adjournment of a debtor's examination, *sine die*. Where an attorney was adjudicated a bankrupt as a bill broker, and on his final examination it appeared that he had lost large sums on horse racing, his examination was adjourned *sine die* with a view to prevent him obtaining his certificate (*Re Parsons*, 6 L. T. Rep. (N.S.) 61, Bank Irish).

It seems to have been the English practice to adjourn the last examination of a bankrupt *sine die* when he had been guilty of an offence, but not such an offence as would justify an absolute refusal of an order of discharge (*Ex parte Grummitt*, 10 L. T. Rep. (N.S.) 680); but this decision was reversed by the Chancellor in the same case on appeal (*Grummitt v. Grummitt*, 10 Jur. (N.S.) 738), where it was held that the adjournment of the last examination must be governed by the same rules as the granting of the order of discharge.

A discharge cannot be refused because applied for to get rid of damages in an action of seduction (*Ex parte Crabtree, Re Taylor*, 10 L. T. Rep. (N.S.) 361); nor does the fact of damages and costs being recovered against a bankrupt in an action for breach of promise of marriage afford any ground for opposition to his discharge (*Re Pearse*, 9 L. T. Rep. (N.S.) 349).

Where a person in business finds himself unable to pay 20s. in the pound it may or may not be his duty to discontinue his trade, according to circumstances: continuing his business may be a fraud, but is not necessarily so. A trader, after discovering that he was not in a position to pay 20s. in the pound, continued his business in the hope, which was not shown to have been absurd or unreasonable, that he would thereby be able to pay all his debts in full and meet all his engagements; and in the course of business so continued contracted some new debts; but was unsuccessful, and after a time found it necessary to make an assignment under this Act. These circumstances were not sufficient to disentitle him to his discharge. The insolvent is entitled to read his own examination on application for discharge (*Re Holt and Gray*, 13 Grant, 568).

The fact of an insolvent having made a preferential assignment in 1857, when it was not illegal, is not a sufficient ground, in itself, for his being refused a discharge, yet its *bona fides* may be inquired into (*Re Parr*, 17 C. P. U. C. 621). In this case a doubt was expressed whether fraud committed before the Act is fraud within the meaning of the Act, so as to make it a valid ground for opposition to the debtor's discharge so long as he fully complies with the other requisites of the Act. A different view was taken in an earlier case in the Court of Chancery (*Re Owens*, 12 Grant, 560), which, however, does not seem to have been cited in the argument.

104. Until the Court or Judge, as the case may be, has confirmed such discharge, the burden of proof of the discharge being completely effected under the provisions of this Act, shall be upon the insolvent; but the confirmation thereof, if not reversed in appeal, shall render the discharge thereby confirmed, final and conclusive; and an authentic copy of the judgment confirming the same shall be sufficient evidence as well of such discharge as of the confirmation thereof.

How the discharge shall be provable.

But a confirmation of discharge under this paragraph is not "final and conclusive" when obtained by fraud or fraudulent preference or by the means of the consent of any creditor procured by payment of any valuable consideration for such consent, see below, secs. 108 and 149 (*Thompson v. Rutherford*, 27 Q. B. U. C. 205). These circumstances constitute a good reply to a plea of a discharge and confirmation thereof.

Application
to Court or
Judge for
discharge, if
not obtained
from credi-
tors.

105. If, after the expiration of one year from the date of an Assignment made under this Act, or from the date of the issue of a Writ of Attachment thereunder, as the case may be, the Insolvent has not obtained from the required proportion of his creditors a consent to his discharge, or the execution of a deed of composition and discharge, he may apply by petition to the Court or Judge, having power hereunder to confirm his discharge if consented to, to grant him his discharge, first giving notice of such application (Form P), for one month in the manner hereinbefore provided for notice of application for confirmation of discharge.

The discharge to be granted under this section cannot be held to have any greater effect to release the debtor from liabilities than the discharge obtained by the consent in writing of creditors as provided in sec. 98. Under the consent discharge the insolvent is only freed from liabilities "mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to his discharge, &c." It has been held that the debtor must embrace in this supplementary list all claims for which he seeks discharge that may not have been already included in a statement regularly furnished. To a plea of discharge under the Insolvent Act, it is a good replication that the plaintiff's name as a creditor, and the claim mentioned in the declaration, were not mentioned in the statement exhibited at the first meeting of creditors, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate (*King v. Smith*, 19 C. P. U. C. 819).

Proceedings
on such
application;
and powers
of the Court
or Judge.

106. Upon such application, any creditor of the insolvent, or the assignee by authority of the creditors may appear and oppose the granting of such discharge upon any ground upon which the confirmation of a discharge may be opposed under this Act, or may claim the suspension or classification of the discharge or both; and whether such application be contested or

not it shall be incumbent upon the Insolvent to prove that he has in all respects conformed himself to the provisions of this Act; and he shall submit himself to any order which the Court or Judge may make, upon or without an application to that effect, to the end that he be examined touching his estate and effects and his conduct and management of his affairs and business generally, and touching each and every detail and particular thereof; and the Court or Judge may also require from the Assignee a report in writing upon the conduct of the Insolvent and the state of his books and affairs before and at the date of his insolvency; and thereupon the Court or Judge, as the case may be after hearing the insolvent, and the opposant, if any, and any evidence that may be adduced, may ^{make} ~~make~~ an order either granting the discharge of the insolvent or refusing it; or in like manner and under the like circumstances to those in and upon which the discharge could be suspended or classified as hereinbefore provided upon an application to confirm it, an order may be made suspending it for a like period, or declaring it to be of the second class, or both.

See notes to sec. 3 above, as to effect of discharge, &c.

107. At any time before judgment upon an application for obtaining a discharge, the creditors or the same proportion of them that may bind the remainder by a consent to a discharge, may file before the Court, or Judge before whom such application is pending, a declaration in writing, setting forth that it is their desire that the discharge of the Insolvent should (if granted) be suspended for a period therein named not exceeding five years, or that it should be classed as second class, or both; and thereupon if such Court or Judge should be of opinion that the Insolvent is not shewn to have done or omitted anything, the doing or omission of which would deprive him of the right to

Suspension of discharge or its classification as second class on application of creditors.

his discharge under this Act (but not otherwise) and shall therefore be of opinion to grant his discharge, such Judge shall declare such opinion, and shall thereupon grant such discharge, but shall suspend the same as required by such declaration of the creditors.

The proportion of the creditors that may bind the remainder by a consent to a discharge, is the majority in number who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three fourths in value of the liabilities of the insolvent (sec. 94 *ante*). The powers given to the creditors by this section are new and most important. The judge has no option to refuse the suspension of the insolvent's discharge when the required proportion of creditors insist upon it; although the words of this section do not seem to bind the judge to follow the desire of the creditors as to the classification of the discharge.

Discharge
obtained by
fraud, to be
void.

108. Every consent to a discharge or composition, and every discharge or confirmation, of any discharge or composition, which has been obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment or promise of payment to such creditor, of any valuable consideration for such consent, or by any fraudulent contrivance or practice whatever tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void.

The words in this section "or by any fraudulent contrivance or practice whatever tending to defeat the true intent and meaning of the provisions of this act in that behalf," are new.

Examina-
tion of
insolvent
and how
conducted
and record-
ed.

EXAMINATION OF THE INSOLVENT AND OTHERS.

109. Immediately upon the expiry of the period of one month from the first insertion of the advertisement giving notice of the appointment of an assignee, a meeting of the creditors shall be held for the public examination of the insolvent, who shall be summoned to attend such meeting, the same being first duly called by advertisement; and at such meeting the insolvent may be examined on oath, sworn before the assignee, by or on behalf of any creditor present, in his turn; and the examination of the insolvent shall be reduced

to writing by the assignee, and signed by the insolvent ; and any question put to the insolvent at such meeting which he shall answer evasively or refuse to answer, shall also be written in such examination, with the replies made by the insolvent to such question ; and the insolvent shall sign such examination, or if he refuse to sign the same, his refusal shall be entered at the foot of the examination, with the reasons of such refusal, if any, as given by himself ; and such examination shall be attested by the assignee and shall be filed in the office of the Court.

How
attested.

The other provisions of the Act being complied with, a discharge cannot be refused to the Insolvent, because of the neglect of the assignee to give notice as required by this section (*Per Van Koughnet, C., in appeal, Re Thomas, 15 Grant, 196*).

110. The insolvent may also be from time to time examined as to his estate and effects upon oath, before the Judge, by the assignee or by any creditor, upon an order from the Judge obtained without notice to the Insolvent, upon petition, setting forth satisfactory reasons for such order,—and he may also be examined in like manner upon a *subpoena* issued as of course without such order, in any case in which a writ of attachment has been issued against his estate and effects ; which *subpoena* may be procured by the plaintiff, or by any creditor intervening in the action for that purpose, or by the assignee, at any time after the return of the writ of attachment.

Further
examination
of Insolvent.

The following words at the end of this section are new : “ At any time after the return of the writ of attachment.”

111. The Insolvent may also be examined on his application for a discharge or for confirmation of a discharge, or upon the application of any creditor for annulling a discharge ; or upon any petition by him in the course of proceedings for the compulsory liquidation of his estate.

Subsequent
examination
on applica-
tion for dis-
charge, &c.

On an application for an order of discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is, as to the weight to be attached to it (*Re Holt and Gray*, 13 Grant, 568).

Other persons may be examined on order of the Judge.

112. Any other person who is believed to possess information respecting the estate or effects of the Insolvent, may also be from time to time examined before the Judge upon oath, as to such estate or effects upon an order from the Judge to that effect, which order the Judge may grant upon petition setting forth satisfactory reasons for such order, without notice to the Insolvent or to the person to be so examined.

A witness appearing upon an order granted by the Judge, under this clause, is not bound to be sworn until his expenses are paid.

But the insolvent who appears by virtue of the same order is not entitled to claim payment of his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in section 109, above (*Worthington v. Taylor*, 10 L. J. U. C. 804).

Insolvent to attend meetings of creditors.

113. The Insolvent shall attend all meetings of his creditors, when summoned so to do by the assignee, and shall answer all questions that may be put to him at such meetings touching his business, and touching his estate and effects; and for every such attendance he shall be paid such sum as shall be ordered at such meeting, but not less than one dollar.

Examination of wife or husband of Insolvent.

114. If it be made known to the Judge by the Assignee by petition substantiated under oath, that any probable cause exists therefor, the Judge may order the wife or husband of the Insolvent, as the case may be, to be examined as to the reception, use, retention or concealment by or on behalf of the Insolvent, or by or on behalf of the person so examined, or any other person, of any of the estate or effects of the Insolvent.

This provision as to the wife or husband of the insolvent is new in Canada, but a similar clause was introduced into the English Act of 1849 (sec. 108), and was not repealed by their Act of 1861.

OF PROCEDURE GENERALLY.

115. All Deeds of Assignment, of Transfer, of Composition and of Reconveyance, shall be executed in the manner in which deeds are usually executed in the Province wherein such deeds shall respectively bear date; and if such deeds be executed in any part of Canada other than the Province of Quebec, according to the form of execution of deeds prevailing there, they shall have the same force and effect in the Province of Quebec as if they had been executed in that Province before a Notary; and if such deeds be executed in that Province before a Notary they shall have the same force and effect elsewhere in the Dominion as if they had been executed according to the law in force in such other Province; and copies of such deeds, certified as aforesaid, shall constitute, before all courts and for all purposes, *prima facie* proof of the execution and of the contents of the originals of such deeds respectively, without production of the originals thereof.

Form of deeds under this Act, and their effect in Provinces other than that in which they are executed.

It is not very clear to what the words in this section, "certified as aforesaid," can apply. This clause was transposed, on the third reading in the House, from its former position immediately following sec. 12, in which there is a reference to "certified copies" of deeds of assignment, executed in Quebec, affecting real estate in other parts of Canada. Copies of such deeds, certified by the notary or other public officer in whose custody the originals may be registered without other evidence of the execution thereof. If it is intended that this provision should extend to all copies desired as evidence of the contents of the original deeds, throughout Canada, the clerk of the County Court in which proceedings are taken, will be the proper officer to certify to the copy in this part of the Dominion.

116. The operation of sections ten and twenty-nine of this Act, shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ; but in the Province of Nova Scotia and New Brunswick this section shall not apply

To what assets certain sections shall apply.

proviso : as to certain Provinces; and as to costs.

to any writ of execution in the hands of the Sheriff, at the time of the coming into force of this Act; and the rights, liens and privileges of the seizing or attaching creditor, for his costs upon any such writ, shall be the same as they were previous to the passing of this Act, in the province in which such writ shall have issued.

This provision was first enacted in the amending Act of 1865, section 12.

The portions of the Insolvent Act, whose operation is hereby extended, are those clauses which set out the effect of a voluntary assignment, and of the appointment of an official assignee, respectively, upon the estate of an insolvent. It is most important that an attachment should supersede any other writs in the hands of the sheriff. An equal distribution of the estate of an insolvent is the aim of these laws, and this object had very little chance of being accomplished so long as it was in the power of a bankrupt to give disgraceful preferences by allowing a favored creditor to get a judgment by default, and secure priority of execution.

Even before this amendment it was more than doubtful whether an assignment or writ of attachment did not cover property of the insolvent under actual seizure by execution. Indeed it has been so held by a County Court Judge, in a case where a writ of attachment under the Absconding Debtors' Act was received by a sheriff, and acted upon by his attaching defendant's goods. Writs of *fi. fa.* were also placed in his hands against defendant, and he subsequently received an attachment in insolvency. In this case it was held that the ordinary writ of attachment, as well as the *fi. fa.*, could not have the effect of keeping the insolvent's property out of the hands of the assignee (*Henry v. Douglas*, 1 L. J. U. C. (N.S.) 108).

By analogy, and by applying the principles and spirit of the Insolvency Act to proceedings in equity to enforce a sale of lands, the effect of a decree for sale is equivalent to the seizure by the sheriff of land under an execution. And, until actual sale under the decree, the lands embraced in it are vested in the assignee by the effect of his appointment, for the general benefit of creditors (*Yale v. Tollerton*, 2 Chy. Chr. Reps. 49).

A curious point arose in connection with the interpretation of this section in *Converse v. Michie*, 16 C. P. U. C. 167. In the afternoon of 18th September, 1865, the Royal assent was given to the amending Act. In the morning of that day a judgment had been recovered by M. against R.; execution had been placed in the hands of the sheriff at half-past ten, and a seizure had been made of the defendant's goods at about eleven. On the same day a writ of attachment was issued by C. against R. under the Act of 1864, and placed in the hands of the same sheriff at about half-past eleven. It was held that under these circumstances the *fi. fa.* goods could not be considered as having been issued and delivered to the sheriff *before* the act came into force, and therefore by virtue of the Act the writ of attachment prevailed over the execution; and the creditor was not entitled to any lien for his costs.

Notices under this Act, how given.

117. Notices of meetings of creditors and all other notices herein required to be given by advertisement, without special designation of the nature of such no-

tice, shall be so given by publication thereof for two weeks in the *Official Gazette*, also in the Province of Quebec in every issue during two weeks of one newspaper in English and one in French, and in the Provinces of Ontario, New Brunswick and Nova Scotia, in one newspaper in English, published at or nearest to the place where the Insolvent has his chief place of business; and in any case, unless herein otherwise provided, the Assignee or person giving such notice shall also address notices thereof to all creditors and to all representatives of foreign creditors within Canada, and shall mail the same with the postage thereon paid, at the time of the insertion of the first advertisement.

118. All questions discussed at meetings of creditors shall be decided by the majority in number of all creditors for sums of one hundred dollars and upwards, present or represented at such meeting, and representing also the majority in value of such creditors, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the Judge, who shall decide between them.

How questions at meetings of creditors shall be decided.



Sec. 11, sub-sec. 2, Act of 1864, made provision for an adjourned meeting in case the majority in number did not agree with the majority in value before leaving the dispute to the decision of the Judge.

In a case under the Act of 1864, where there was a disagreement between the majority in number and the majority in value, and the motion to adjourn was opposed by the majority in value, it was held that neither party could legally oppose the adjournment if insisted upon by the other, because by doing so either party would have the power to prevent an adjudication between them by the Judge, who in this case and in other instances (secs. 28, 77, 103, 105) is to be the referee on divisions or differences arising (*Re Lamb*, 17 C. P. U. C. 173; and see *Re Lamb*, 13 Grant, 391).

119. If for any purpose it becomes necessary to ascertain the proportion of the creditors of an Insolvent who have voted at any meeting or concurred in any act or document, and if it be found that the whole

Questions as to number and value of creditors voting, how decided.

of the creditors holding claims against an Insolvent for sums of one hundred dollars and upwards do not represent the proportion in value of the liabilities of the Insolvent subject to be computed in that behalf and required to give validity to such vote, act or documents such proportion may be completed by the votes or concurrence of creditors holding claims of less than one hundred dollars.

This is taken from the Act of 1865, sec. 21.

Notice
pending
delay.

120. Whenever a meeting of creditors cannot be held, or an application made, until the expiration of a delay named herein, notice of such meeting or application may be given pending such delay.

This was first enacted in the Act of 1865, sec. 30.

Certain
things may
be done at
first meet-
ing, though
not men-
tioned in
notice.

121. If the first meeting of creditors which takes place after the expiry of the period of one month from the advertisement of the appointment of an assignee be called for the ordering of the affairs of the estate generally, and it be so stated in the notices calling such meeting, all the matters and things respecting which the creditors may vote, resolve or order, or which they may regulate under this Act, may be voted, resolved or ordered upon and may be regulated at such meeting, without having been specially mentioned in the notices calling such meeting, notwithstanding anything to the contrary in this Act contained, due regard being had, however, to the proportions of creditors required by this Act for any such vote, resolution, order or regulation.

Very extensive, but quite necessary powers, are given to the creditors at their first meeting. They should not fail on that occasion to give their attention to all the different points on which they are empowered to act. They should regulate the security to be given by the assignee, and the remuneration that he is to receive; give general and particular instructions to the assignee, and act upon his report on the many questions that may have arisen. They might also have the insolvent examined before them under the authority of section 109.

122. The claims of creditors (Form Q) shall be furnished to the Assignee or interim Assignee, as the case may be, in writing, and they shall be attested under oath, taken in Canada before the Assignee or before any Judge, Commissioner for taking affidavits, or Justice of the Peace, and out of Canada before any Judge of a Court of Record, any Commissioner for taking affidavits appointed by any Canadian Court, the Chief Municipal Officer for any town or city, or any British Consul or Vice-Consul, or before any person authorized by any statute of Canada or of any Province therein to take affidavits to be used in any part of Canada.

Form and
attestation
of claims,
and before
whom to be
attested.

For the proper person to make this affidavit see below, sec. 123.

Certain creditors are by special enactment entitled to prove their debts against the estate of a bankrupt. By 10 & 11 Vic., c. 10 (Con. Stats. Canada, c. 59), an owner of goods that have been pledged by an agent entrusted with the possession of them is entitled to redeem the same upon certain terms. Section 21 of the Consolidated Act provides for the rights of the creditor in case of the bankruptcy of such agent as follows:—

“In case of the bankruptcy of any such agent, and in case the owner of the goods redeems the same, he shall, in respect of the sum paid by him on account of the agent for such redemption, be held to have paid the same for the use of such agent before his bankruptcy, or in case the goods have not been so redeemed the owner shall be deemed a creditor of the agent for the value of the goods so pledged, at the time of the pledge, and may in either case prove for, or set off the sum so paid, or the value of such goods, as the case may be.”

A wife may not prove against her husband's estate for arrears of alimony payable to her under an order of the Court of Chancery (*Ex parte Rice*, 10 L. T. Rep. (N.S.) 103).

One of several makers of a joint and several promissory note in favour of a third party having paid the debt secured by the note, may not prove upon the note against some of the co-makers under their bankruptcy. His remedy is by contribution from each of his co-contractors *pro portione* (*Ex parte Schenk, Re Viner*, 10 L. T. Rep. (N.S.) 44).

Upon a creditor coming in to prove against an estate upon a judgment debt, the consideration therefor may be inquired into on the ground of fraud (*Re Soverby*, 6 L. T. Rep. (N.S.) 581). A creditor cannot prove for a debt that is due under a parol contract where the Statute of Frauds requires the contract to be in writing (*Re The Pentreguinea Fuel Company, Ex parte Acraman*, 8 Jur. (N.S.) 706).

Where the executor under the will of a creditor of a bankrupt firm declines to make proof against the estate of the bankrupts, on the ground that he is ignorant of the circumstances, under which the debt accrued, the court will allow proof by the residuary legatees under the will, subject to a direction

for payment of the dividend to the executor (*Ex parte Caldwell, Re Strahan, Paul and Bates*, 13 W. R. 952).

Affidavits,
before whom
to be made.

123. Any affidavit requiring to be sworn in proceedings in insolvency, may be sworn before any Commissioner for taking affidavits, appointed by any of the Courts of Law or of Equity in any of the said Provinces; or before any Judge having civil jurisdiction in any of the said Provinces; and such affidavit may be made by the party interested, or by his agent in that behalf having a personal knowledge of the matters therein stated.

Set-offs, how
allowed.

124. The Statutes of set-off shall apply to all claims in insolvency and also to all suits instituted by the Assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent as if the insolvent were plaintiff or defendant as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

This clause appeared first in the amending Act of 1865.

The right of set-off is a purely statutory provision, and it is the better opinion that it did not apply to mutual debts due respectively to and by a bankrupt estate until this amendment. Formerly, if a creditor of a bankrupt were also indebted to the bankrupt, the assignee might sue him for, and recover the amount of the latter debt, and he might prove upon the bankrupt's estate for the amount due to him. This was extremely disadvantageous to creditors, where there happened to be mutual dealings between them and the bankrupt; they would have to pay the whole of the debts due by them and receive, probably, but a fractional part of the debt due to them. This was remedied in England by several enactments; but by the statute which introduced English laws into Upper Canada, "those respecting bankrupts" are excepted; and we were left without a law of set-off in insolvency matters. This amendment removes a source of great injustice to creditors.

The debt due from the bankrupt to the creditor must be such as might be proved under the bankruptcy, otherwise it cannot be set-off; and the mutual credits must be given before the bankruptcy, so as to make the balance claimed due at the time of the bankruptcy (*Hewison v. Guthrie*, 3 Scott, 298). If a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set-off the payments against the receipts, as against the assignee (*Vernon v. Hankey*, 2 T. R. 113; *Raphael v. Birdwood*, 5 Price, 604).

Debts to be set-off, however, must both be due in the same right; you cannot set-off a debt due to an executor against a debt due from him in his

own right (*Bishop v. Church*, 3 Atk. 691). A debt due by an insolvent to a firm cannot be set-off against a private debt due from one of the partners to the insolvent (*Ex parte Soames*, 3 D. & C. 320).

Where an assignee has reason to doubt the fairness of a creditor's set-off, and has the option of suing either by action *ex contractu*, as assumpsit, debt, &c., or by action *ex delicto*, as trover, case, &c., he should adopt the latter; for in actions *ex delicto* the defendant cannot set off any debt due to him by the bankrupt (*Wilkins v. Carmichael*, 1 Doug. 101; *Key v. Flint*, 8 Taunt. 21). A bankrupt on the eve of bankruptcy sold and delivered goods to one of his creditors for the purpose of giving him a fraudulent preference, and the assignees afterwards brought an action of assumpsit against him, to recover the amount of the goods; it was held that although the assignees might have disaffirmed the contract of the bankrupt, and have recovered the value of the goods in trover, in which case there could have been no set-off, yet, as they had sued in assumpsit, and thereby confirmed the contract, the creditor was entitled to set-off his debt (*Smith v. Hodson*, 4 T. R. 211).

If, by mistake, a creditor pay the assignees the whole amount of his debt, without deducting his set-off, he may afterwards recover it from the assignees as money had and received to his use (*Bise v. Dickson*, 1 T. R. 285).

Service of
papers
under this
Act.

125. One clear day's notice of any petition, motion, order or rule, shall be sufficient if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding; and service of such notice shall be made in such manner as is now prescribed for similar services in the Province within which the service is made.

Commissions for
examination
of witnesses.

126. The Judge shall have the same power and authority in respect of the issuing and dealing with commissions for the examination of witnesses, as are possessed by the ordinary Courts of Record in the Province in which the proceedings are being carried on, and may also on petition of either of the parties to a contestation before an Assignee, order the issue of such a commission by the Assignee.

Formerly (sec. 11, sub-sec. 10, Act of 1864) there was no power to issue a commission in matters before the assignee.

The issue of commissions for the examination of witnesses in Courts of Record in Ontario is principally regulated by the following sections of chapter 32 Con. Stats. U. C. :—

“Sec. 19.—In case the plaintiff or defendant in any action in either of the superior Courts of Common Law, or in any County Court, is desirous of

having at the trial thereof, the testimony of any aged or infirm person resident within Upper Canada, or of any person who is about to withdraw therefrom, or who is residing without the limits thereof, the Superior Court in which the action is pending, or a judge of either of such Courts, or the County Court in which the action is pending, or a judge thereof, may, upon the motion of such plaintiff or defendant, and upon hearing the parties, order the issue of one or more Commission or Commissions, under the seal of the Court in which the action is pending, to one or more Commissioner or Commissioners, to take the examination of such person or persons respectively.

Sec. 20.—Due notice of every such Commission shall be given to the adverse party to the end that he may cause the witnesses to be cross-examined.

Sec. 21.—In case the examination of any witness or witnesses taken without the limits of Upper Canada, pursuant to any such Commission, be proved by an affidavit of the due taking of such examination, sworn before, and certified by the Mayor or Chief Magistrate of the city or place where the same has been taken, and in case such commission with such examination and affidavit thereto annexed be returned to the Court from which such commission issued close under the hand and seal of one or more of the Commissioners, the same shall *prima facie* be deemed to have been duly taken, executed and returned, and shall be received as evidence in the cause, unless it be made to appear to the Court in which such examination is returned and published, or before which the same is offered in evidence, that the same was not duly taken; or that the deponent is of sound mind, memory, and understanding, and living within the jurisdiction of the Court at the time such examination is offered in evidence to such Court."

Subpoenas
to witness.

127. In any proceeding or contestation in insolvency, the Court or Judge, or the Assignee, as the case may be, may order a Writ of *subpoena ad testificandum* or of *subpoena duces tecum* to issue, commanding the attendance as a witness of any person within the limits of Canada.

Service of
process, &c.

128. All rules, writs of subpoena, orders and warrants, issued by any Judge, Court or Assignee in any matter or proceeding under this Act, may be validly served in any part of Canada upon the party affected or to be affected thereby; and the service of them, or any of them, may be validly made in such manner as is now prescribed for similar services in the Province within which the service is made; and the person charged with such service shall make his return thereof and on oath, or, if a Sheriff or Bailiff in the Province of Quebec, may make such return under his oath of office.

129. In case any person so served with a writ of *subpœna* or with an order to appear for examination, does not appear according to the exigency of such writ or process, the Court or the Judge on whose order or within the limits of whose territorial jurisdiction the same is issued, may, upon proof made of the service thereof, and of such default, if the person served therewith has his domicile within the limits of the Province within which such writ or process issued, constrain such person to appear and testify, and punish him for non-appearance or for not testifying in the same manner as if such person had been summoned as a witness before such Court or Judge, in an ordinary suit; and if the person so served and making default, has his domicile beyond the limits of the Province within which such writ or process issued such Court or Judge may transmit a certificate of such default to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as it might have done if such person had neglected or refused to appear to a writ of *subpœna* or other similar process issued out of such last mentioned Court; and such certificate of default signed by the Court, Judge or Assignee before whom default was made and copies of such writ, process and of the return of service thereof certified by the Clerk of the Court in which the order of transmission is made, shall be *prima facie* proof of such writ or process, service, return, and of such default.

Disobedience of writs and process, how punishable.

Proof of default.

130. No such certificate of default shall be so transmitted, nor shall any person be punished for neglect or refusal to attend for examination in obedience to any such *subpœna* or other similar process, unless it be made to appear to the Court or Judge transmitting,

Expenses must be tendered to person summoned as a witness, &c.

and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem*, and per mile allowed to witnesses by the law and practice of the Superior Courts of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence, and of returning from giving evidence, had been tendered to such person at the time when the writ of subpœna, or other similar process, was served upon him.

These provisions are mainly taken from Con. Stats. Can. ch. 79.

Forms
under this
Act.

131. The forms appended to this Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided; and in every contestation of a claim, collocation, or dividend or of an application for a discharge, or for confirming or annulling a discharge, the facts upon which the contesting party relies, shall be set forth in detail, with particulars of time, place and circumstance, and no evidence shall be received upon any fact not so set forth; but in every petition, application, motion, contestation, or other pleading under this Act, the parties may state the facts upon which they rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life shall apply.

Construc-
tion of state-
ments.

Foreign dis-
charges not
to bar debts
contracted
in Canada.

132. No plea or exception alleging or setting up any discharge or certificate of discharge, granted under the Bankrupt or Insolvent Law, of any country whatsoever beyond the limits of Canada, shall be a valid defence or bar to any action instituted in any Court of competent jurisdiction in Canada, for the recovery of any debt or obligation contracted within such limits.

As to amend-
ments in
proceedings
under this
Act.

133. The rules of procedure as to amendments of pleadings, which are in force at any place where any proceedings under this Act are being carried on, shall

apply to all proceedings under this Act; and any Court or Judge, or Assignee, before whom any such proceedings are being carried on, shall have full power and authority to apply the appropriate rules as to amendments, to the proceedings so pending before him; and no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the Court.

134. The death of the Insolvent, pending proceedings upon a voluntary assignment or in compulsory liquidation, shall not affect such proceedings, or impede the winding up of his estate; and his heirs or other legal representatives may continue the proceedings on his behalf to the procuring of a discharge, or of the confirmation thereof, or of both; and the provisions of this Act shall apply to the heirs, administrators or other legal representatives of any deceased person who, if living, would be subject to its provisions, but only in their capacity as such heirs, administrators or representatives, without their being held to be liable for the debts of the deceased, to any greater extent than they would have been if this Act had not been passed.

Provision in case of death of insolvent.

Representatives, how far liable.

The death of the bankrupt after the Act of Bankruptcy, and the commencement of proceedings under this Act, but before the appointment of assignees may occasion some curious results. For instance, if a bankrupt be seized or possessed of lands in joint tenancy his moiety of course passes to the assignees by their appointment, and they unquestionably hold as tenants in common with the person seized or possessed of the other moiety. But a question will arise as to whether the death of the bankrupt before the actual execution of the appointment of the assignees would have the effect of preventing survivorship.

135. The costs of the proceedings in Insolvency up to and inclusive of the notice of the appointment of the Assignee, shall be paid by privilege as a first charge upon the assets of the insolvent; the disbursements necessary for winding up the estate shall be the next charge on the property chargeable with any

Costs; on what property and in what order chargeable.

mortgage, hypothec or lien, and upon the unincumbered assets of the estate respectively, in such proportions as may be justified by the nature of such disbursements, and their relation to the property as being incumbered or not, as the case may be; and the remuneration of the assignee and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge if obtained direct from the Court, and the costs of the discharge of the assignee being first taxed by the Judge at the tariff, or if there be no tariff at the same rate as is usual for uncontested proceedings of a similar character, after notice to the inspectors, or to at least three creditors, shall also be paid therefrom as the last privileged charge thereon.

Provision as
to letters
addressed to
Insolvent by
Post.

136. The Judge shall have the power, upon special cause being shewn before him under oath for so doing, to order the Postmaster at the place of residence of the insolvent, to deliver letters addressed to him received at such Post Office to the Assignee, and to authorize the Assignee to open such letters in the presence of the Prothonotary or Clerk of the Court of which such Judge is a member; and if such letters be upon the business of the estate the Assignee shall retain them, giving communication of them however to the insolvent on request; and if they be not on the business of the estate they shall be re-sealed, endorsed as having been opened by the Assignee and returned to the Post Office; and a memorandum in writing of the doings of the Assignee in respect of such letters, shall be made and signed by him and by the Prothonotary or Clerk, and deposited in the Court.

This section is new to Canada, but since the Act of 1849, sec. 124, the English court has had power to order that all post letters directed to the bankrupt be delivered by the postmaster to the official assignee. It has been held that if the bankrupt abscond without surrendering, the court will order all his past letters addressed to his place of business to be intercepted and sent to the official assignee (*Re Lawrence*, 20 L. T. Rep. 16).

137. If the Judge holds a claim against the estate of an insolvent he shall be *ipso facto* disqualified from acting as a Judge in any matter connected with such claim; and in such case the Judge competent to act in matters of insolvency, in any of the counties adjoining that in which the insolvent has his chief place of business, and who is not disqualified under this section, shall be the Judge who shall have jurisdiction in such matter, in the place and stead of the Judge so disqualified; and if the Assignee to any estate be a claimant thereon as a creditor, or be collocated for any charges or remuneration, or be the agent, attorney or representative of any claimant thereon, he shall not hear, award or determine upon any contestation of his own claim or collocation, or of the claim of the person represented by him, or of any dividend thereon, or upon any contestation or issue raised by him, or by the person represented by him; but in such case such contestation shall be decided by the Judge, subject to appeal, as hereinbefore provided; and upon a suggestion being filed before the Judge, or the Assignee, as the case may be, of his disqualification under this section, the Judge or Assignee shall be bound within twenty-four hours thereafter, to declare under his hand, by a writing filed with the Assignee, whether such Judge or Assignee is so disqualified or not, and if he does not, he shall be conclusively held to be so disqualified; and the validity or correctness of such declaration may be contested, in the case of the Judge, by summary petition before the Judge who would be competent to act in the place or stead of the Judge alleged to be disqualified, and in the case of the Assignee, by the Judge.

Provision as to cases in which the Judge or Assignee has a claim on the Estate.

This provision for cases where the judge or assignee has a claim upon the estate is new, but on the part of the judges at least, the ordinary feeling of delicacy would surely have prevented judicial action in a case when personal interests might conflict with justice.

Rules of practice and Tariff of Fees in the Province of Quebec; how to be made.

138. In the Province of Quebec, rules of practice for regulating the due conduct of proceedings under this Act, before the Court or Judge, and tariffs of fees for the officers of the Court, and for the Advocates and Attorneys practising in relation to such proceedings, shall be made forthwith after the passing of this Act, and when necessary repealed or amended, and shall be promulgated, under or by the same authority and in the same manner as the rules of practice and tariff of fees of the Superior Court, and shall apply in the same manner and have the same effect in respect of the proceedings under this Act, as the rules of practice and tariff of fees of the Superior Court apply to and affect the proceedings before that Court; and Bills of costs upon proceedings under this Act may be taxed and proceeded upon in like manner, as bills of costs may now be taxed and proceeded upon in the said Superior Court; but until such rules of practice and tariff of fees have been made, the rules of practice and tariff of fees in Insolvency, now in force in the said Province, shall continue and remain in full force and effect.

Present rules, &c., to remain until altered

And in the other Provinces.

139. In the Province of Ontario the Judges of the Superior Courts of Common Law,* and of the Court of Chancery, or any five of them, of whom the Chief Justice of the Province of Ontario, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one,—in the Province of New Brunswick, the Judges of the Supreme Court of New Brunswick, or the majority of them,—and in the Province of Nova Scotia, the Judges of the Supreme Court of Nova Scotia, or the majority of them,—shall forthwith make, and frame, and settle such forms, rules and regulations, as shall be followed and observed in the said Provinces respectively, in the proceedings in insolvency under this Act, and shall fix and settle the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to Attorneys, Solicitors, Counsel,

and Officers of Court, whether for the Officer or for the Crown as a fee for the fee fund or otherwise, and by or to Sheriffs, Assignees or other persons whom it may be necessary to provide for.

In the Act of 1864, while the section relating to the rules of practice in Lower Canada was clear in its language directing that such rules *should be made forthwith* (sec. 11, sub-sec. 17), the corresponding provision for Upper Canada only provided that the Judges of the Superior Courts *should have power* to frame and settle such rules, etc. The consequence seems to be that a tariff is at present the only matter regulating the practice in Ontario in addition to the Act itself. Perhaps the Legislature, in the altered language of this section, desires to convey a rebuke to the members of our Superior Courts; but while it is most important that the rules of practice in insolvency should be established, it is a hardship that these new labors should be cast upon the already over-worked Judges, who are not so well remunerated that they should be expected to do what is merely to reduce to uniformity the practice in the County Courts. There are able Judges enough in the County Courts to accomplish the regulation of the procedure before themselves.

140. In the Province of Quebec every trader having a marriage contract with his wife, by which he gives or promises to give or pay or cause to be paid, any right, thing, or sum of money, shall enregister the same, if it be not already enregistered, within three months from the execution thereof; and every person not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously there enregistered), within thirty days from becoming such trader; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such insolvent for any advantage conferred upon or promised to her by its terms; nor shall she be deprived by reason of its provisions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law; but this section shall be held to be only a continuance of the second paragraph of section twelve of the Insolvent Act of 1864, and shall not

Registration
of marriage
contracts of
traders in
Quebec.

Conse-
quence of
default.

Proviso.

relieve any person from the consequences of any negligence in the observance of the provisions of the said paragraph.

Certain words in 29 Vic., c. 18, interpreted.

141. The words “any official assignee,” used in the second section of the Act twenty-ninth Victoria, chapter eighteen, are hereby declared to have meant, and to mean, any official assignee whatever, and shall be construed as if they were followed by the words “resident or appointed, in any part of the Province of Canada:” But this declaration shall not affect any contestation heretofore determined or now pending respecting the validity of any assignment heretofore made to an official assignee resident in a county or district different from that in which the domicile or place of business of the insolvent was situate at the time of such assignment.

See notes to section 2 *ante*.

Certain words in this Act interpreted.

142. The words “before Notaries” or “before a Notary” shall mean executed in notarial form, according to the law of the Province of Quebec; the words “the Judge” shall, in the Province of Quebec, signify a Judge of the Superior Court of the Province of Quebec, having jurisdiction at the domicile of the insolvent,—in the Provinces of Ontario and New Brunswick a Judge of the County Court of the County or Union of Counties in which the proceedings are carried on,—and in the Province of Nova Scotia, a Judge of Probate,—except in cases proceeding in the city of Halifax, in which case they shall mean a Judge of the Supreme Court of Nova Scotia; and the words “the Court,” shall, in the Province of Quebec, signify the said Superior Court, and in the Provinces of Ontario and New Brunswick the County Court, and in the Province of Nova Scotia the Supreme Court of Nova Scotia, unless it is otherwise expressed or unless the context plainly requires a different construction.

143. The word "day" shall mean a judicial day; the words "Official Gazette" shall mean the Gazette which is used in any Province as the official medium of communication between the Lieutenant Governor and the people; the word "Creditor" shall be held to mean every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety, and who shall have proved his claim against the estate of an insolvent in the manner provided by this Act; but no proceeding, discharge or composition had or consented to previous to the passing of this Act, and not now the subject of dispute and in litigation on the ground that a creditor voting thereon or a party thereto had not proved his claim shall be held invalid by reason of any such creditor not having previously proved his claim as aforesaid, notwithstanding that such creditor or the claims he represents be requisite to complete the proportion necessary to give validity under this Act to such proceeding, discharge or composition; the word "collocated" shall mean ranked or placed in the dividend sheet for some dividend or sum of money; and all the provisions of this Act shall be held to apply equally to unincorporated trading companies and co-partnerships; and the chief office or chief place of business of such unincorporated trading companies and co-partnerships shall be their domicile or place of business as the case may be for the purposes of this Act: and the words "Board of Trade" in the said Act, are hereby declared to have meant and in this Act shall mean any body of persons openly exercising the ordinary functions of a Board of Trade or Chamber of Commerce whether incorporated or not.

Other words
interpreted.
"Day."
"Official
Gazette."
"Creditor."

"Collocated."

Application
to compa-
nies and
partnerships

"Board of
Trade."

This interpretation of the meaning of the words "Board of Trade" became necessary from the decision in *Newton v. Ontario Bank* (13 Grant, 652, and in appeal 15 Grant, 283), where it was held that official assignees could not be appointed by unincorporated Boards of Trade formed after the passing of the Insolvent Act.

Limitation of proceedings to set aside anything done under this Act.

144. After the expiration of one year from the appointment of an Assignee, no suit or proceeding shall be instituted or commenced for the setting aside of any Act or proceeding preliminary to such appointment or of such appointment; nor shall any such appointment or the proceedings preliminary thereto be impeached, or the validity thereof put in issue by any pleading in any suit or proceeding; but after the expiration of the said period, as to all persons not previously contesting the same and until set aside by the decision of a Court of law or of equity, upon a previous contestation thereof, such appointment and the proceedings preliminary thereto, shall be conclusively presumed to be valid and sufficient.

This section is entirely new, and it is reasonable that after the expiration of a year from the appointment of an assignee, which would be about the time of the insolvent's application for a discharge, all preliminary proceedings should be presumed valid and sufficient.

OF IMPRISONMENT FOR DEBT.

Insolvent in Gaol or on the limits may apply to Judge for discharge.

145. Any debtor confined in gaol or on the limits in any civil suit who may have made the assignment provided for in the second section of this Act; and against whom process for compulsory liquidation under this Act may have been issued, may at any time after the meeting of creditors provided for in the third Section of this Act, or the appointment of an Assignee under this Act, make application to the Judge of the County or District in which his domicile may be or in which the gaol may be in which he is confined, for his discharge from imprisonment or confinement in such suit; and thereupon such Judge may grant an order in writing directing the Sheriff or Gaoler to bring the debtor before him for examination at such time and place in such County or District as may be thought fit; and the said Sheriff or Gaoler shall duly obey such order, and shall not be liable for any action for

Proceedings hereon.

escape in consequence thereof, or for any action for the escape of the said debtor from his custody, unless the same shall have happened through his default or negligence :

2. In pursuance of such order the said confined debtor and any witnesses subpoenaed to attend and give evidence at such examination may be examined on oath at the time and place specified in such order before such Judge, and if on such examination it shall appear to the satisfaction of the Judge that the said debtor has *bona fide* made an assignment as required by the tenth Section of this Act, and has not been guilty of any fraudulent disposal, concealment or retention of his estate or any part thereof or of his books and accounts or any material portion thereof or otherwise in any way contravened the provisions of this Act, such Judge shall by his order in writing discharge the debtor from confinement or imprisonment, and on production of the order to the Sheriff or Gaoler, the debtor shall be forthwith discharged without payment of any gaol fees ; provided always that no such order shall be made in any suit unless it be made to appear to the satisfaction of such Judge that at least seven days notice of the time and place of the said examination had been previously given to the plaintiff in such suit or his attorney, and to the Assignee for the time being ;

Examination of insolvent and witnesses.

Judge may discharge him if the examination be satisfactory.

3. The minutes of the examination herein mentioned shall be filed in the office of the Clerk of the Court out of which the process issued, and a copy thereof shall be delivered to the Assignee, and if during the examination, or before any order be made the Official Assignee or the appointed Assignee, or the creditor, or any one of the creditors at whose suit or suits he shall be in custody, shall make affidavit that he has reason to believe that the debtor has not made a full

Minutes of examination to be kept.

Postpone-
ment in
certain cases

disclosure in the matters under examination, the Judge may grant a postponement of such examination for a period of not less than seven days nor more than fourteen days, unless the parties consent to an earlier day;

As to any
subsequent
arrest.

4. After such discharge, in case of any subsequent arrest in any civil suit as aforesaid for causes of action arising previous to the assignment or process for compulsory liquidation, the said debtor may, pending the further proceedings against him under this Act, be forthwith discharged from confinement or imprisonment in such suit, on application to any Judge on producing such previous discharge; provided that nothing in this section contained shall interfere with the imprisonment of the said debtor, in pursuance of any of the provisions of this Act.

Proviso.

These provisions are new to our bankruptcy laws. The English Act of 1849, sec. 112 (not repealed by Act of 1861), provided for the bankrupt's protection and discharge from custody, except in cases of imprisonment for any debt contracted by fraud or breach of trust, or for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, and several other descriptions of action. These clauses go much further than the English, and provide that a debtor confined in gaol, or on the limits, in *any civil suit*, may be brought before the court, and if he has made an assignment and does not appear to have been guilty of having contravened the provisions of this Act, the Judge shall discharge him. No objection can be taken to the application for discharge according to the terms of the clause, even on the ground that the imprisonment is in an action for a debt contracted by fraud or breach of trust. It certainly seems unreasonable, if such be the true construction of the Act, that a defendant held, for example, under a writ of *capias* on a claim for damages in an action for seduction, should be enabled to obtain his discharge from custody by simply making an assignment under this Act. By reference to section 100, *ante*, it will be seen that a discharge in insolvency does not release the insolvent from a debt due as damages in an action for seduction. Why, then, should he be enabled to abscond, and defeat the plaintiff, by simply making a voluntary assignment when he is put into gaol? If it is impossible to construe these clauses in such a way as to prevent the release from custody, where the debt for which the insolvent is imprisoned falls under the class of debts from which he is not relieved by a discharge in insolvency, the prompt interference of the legislature is necessary.

OFFENCES AND PENALTIES.

Assignees,
Guardians,
and Interim

146. Every Interim Assignee to whom an assignment is made under this Act, every guardian ap-

pointed under a writ of attachment in compulsory liquidation, and every Assignee appointed under the provisions of this Act, is an agent within the meaning of the seventy-sixth and following sections of the *Act respecting Larceny and other similar offences*, and every provision of this Act, or resolution of the creditors, relating to the duties of an interim Assignee, Guardian or Assignee, shall be held to be a direction in writing, within the meaning of the said seventy-sixth section; and in an indictment against an interim Assignee, Guardian or Assignee under any of the said sections, the right of property in any moneys, security, matter or thing, may be laid in "the creditors of the insolvent (*naming him*), under the Insolvent Act of 1869," or in the name of any Assignee subsequently appointed, in his quality of such Assignee.

Assignees, to be deemed agents for certain purposes.

Were it not for the protection against frauds on the part of assignees that this provision gives the creditors, they might occasionally find themselves in a worse position after the assignment than before it.

147. From and after the coming into force of this Act, any insolvent who shall do any of the acts or things following with intent to defraud, or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the Court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute :

Certain acts by Insolvents to be misdemeanors.

(1) If he shall not upon examination fully and truly discover to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred thereof or of any part thereof, except such part has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in

Not fully discovering or not delivering property, books, papers, &c.

the ordinary expenses of his family, or shall not deliver up to the Assignee all such part thereof as is in his possession, custody or power (except such portion thereof as is exempt from seizure as hereinbefore provided), and also all books, papers and writings in his possession, custody or power, relating to his property or affairs ;

Removing
property.

(2) If within thirty days prior to the execution of a deed of assignment, or the issue of a writ of attachment under this Act, he shall, with intent to defraud his creditors, remove, conceal or embezzle any part of his property, to the value of fifty dollars or upwards ;

Not de-
nouncing
false claims.

(3) If in case of any person having to his knowledge or belief proved a false debt against his estate, he shall fail to disclose the same to his Assignee within one month after coming to the knowledge or belief thereof ;

False
schedule.

(4) If he shall with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever ;

Withholding
books, &c.

(5) If he shall with intent to conceal the state of his affairs, or to defeat the object of this Act or of any part thereof, conceal, or prevent or withhold the production of any book, deed, paper or writing relating to his property, dealings or affairs ;

Falsifying
books, &c.

(6) If he shall with intent to conceal the state of his affairs, or to defeat the object of the present Act, or of any part thereof, part with, conceal, destroy, alter, mutilate or falsify, or cause to be concealed, destroyed, altered, mutilated or falsified, any book, paper, writing or security or document relating to his property, trade, dealings or affairs, or make or be privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document or writing relating thereto ;

Stating ficti-
tious losses.

(7) If he shall, at his examination at any time, or at any meeting of his creditors held under this Act, have

attempted to account for any of his property by fictitious losses or expenses ;

(8) If within the three months next preceding the execution of a deed of assignment, or the issue of a writ of attachment in compulsory liquidation, he pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property, goods or effects the price of which shall remain unpaid by him during such three months.

Disposing of
goods not
paid for.

The provisions of this section are new in Canada, and are taken from the English Act of 1861. In section 221 of that Act, there are eleven distinct offences mentioned for which an insolvent may be punished, while here there are only eight enumerated. In section 92, *ante*, there is a provision for punishment in case of fraudulently obtaining goods on credit or advances in money, which is nearly equivalent to one of the clauses in the English Act that has been omitted in this section. See also sec. 150, below.

When a bankrupt had in his schedule inserted a party as a creditor at whose suit he was then detained in custody, and it appeared that such party was not a creditor in any shape. Held that this was a making of a fraudulent entry in a document with intent to defraud his creditors (*Re Button*, 33 L. T. Rep. 95). It would seem that obtaining goods upon credit and selling or pledging them immediately does not constitute an offence, unless from attendant circumstances fraud can be inferred. A loss resulting to the estate from the transaction makes no difference (*Ex parte Manico*, 3 D. M. & G. 502; s. c. D. M. & G. B. A. 270). The language, however, of the 8th clause of this section seems wide enough to cover such a case.

Upon an indictment against a bankrupt, an allegation that, at the time of his examination under the bankruptcy, he was possessed of certain real estate, and charging that at the time of his examination he feloniously did not discover when he disposed of such estate with intent to defraud his creditors, was held bad in arrest of judgment for not containing an averment that the bankrupt had in fact disposed of the estate (*Regina v. Harris*, 19 L. J. 11 M. C.)

148. All offences punishable under this Act shall be tried as other offences of the same degree are triable in the Province where such offence is committed, save that the Jury empanelled to try the same shall be a special Jury, to obtain which the prosecuting officer is required and authorized to take such proceedings as in a civil case are necessary to obtain such a Jury.

How
offences
against this
Act shall be
tried.

X

149. If any creditor of an insolvent, directly or indirectly, takes or receives from such insolvent, any payment, gift, gratuity or preference, or any promise of payment, gift, gratuity or preference, as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him, or if any creditor knowingly ranks upon the estate of the insolvent for a sum of money not due to him by the insolvent or by his estate, such creditor shall forfeit and pay a sum equal to treble the value of the payment, gift, gratuity or preference so taken, received or promised, or treble the amount improperly ranked for, as the case may be, and the same shall be recoverable by the assignee for the benefit of the estate, by suit in any competent court, and when recovered, shall be distributed as part of the ordinary assets of the estate.

Creditors taking consideration for granting discharge, &c.

150. If, after the issue of a writ of attachment in insolvency, or the execution of a deed of assignment, as the case may be, the insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of debt, or any sum or sums of money, belonging or due to him, and retains and withholds from his Assignee, without lawful right, such portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the Assignee may make application to the Judge, by summary petition and after due notice to the insolvent, for an order for the delivery over to him of the effects, documents, or moneys so retained; and in default of such delivery in conformity with any order to be made by the Judge upon such application, such insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such Judge may order.

Punishment of insolvent receiving money, &c., and not handing the same to Assignee.

151. The deeds of assignment and of transfer, or in the Province of Quebec, authentic copies thereof, or a duly authenticated copy of the record of appointment of an assignee, or a copy of the instrument of appointment of the interim Assignee when he becomes Assignee, certified by the Clerk or Prothonotary of the Court in which such instrument is deposited, under the seal of such Court, according to the mode in which the Assignee is alleged to be appointed, shall be *prima facie* evidence in all courts, whether civil or criminal, of such appointment, and of the regularity of all proceedings at the time thereof and antecedent thereto.

Certain documents to be evidence.

152. One per centum upon all moneys proceeding from the sale by an Assignee, under the provisions of this Act, of any immovable property in the Province of Quebec, shall be retained by the Assignee out of such moneys, and shall, by such Assignee, be paid over to the sheriff of the district, or of either of the counties of Gaspé or Bonaventure, as the case may be, within which the immovable property sold shall be situate, to form part of the Building and Jury Fund of such District or County.

Contribution to Building and Jury Fund in Quebec.

153. The Governor in Council shall have all the powers with respect to imposing a tax or duty upon proceedings under this Act, which are conferred upon the Governor in Council by the thirty-second and thirty-third sections of the one hundred and ninth chapter of the Consolidated Statutes for Lower Canada, and by the Act intituled: *An Act to make provision for the erection or repair of Court House and Gaols at certain places in Lower Canada* (12 Vic., cap. 112).

Governor in Council to have certain powers.

REPEAL OF ACTS.

154. The Insolvent Act of 1864, and the Act to amend the same, passed by the Parliament of the late Province of Canada in the 29th year of Her Majesty's Reign, are hereby repealed, except in so far as regards

Insolvent Act of 1864, and Act amending it repealed: saving certain pro-

ceedings and
matters.

proceedings commenced and now pending thereunder and as regards all contracts, acts, matters and things made and done before this Act shall come into force, to which the said Acts or any of the provisions thereof would have applied if not so repealed, and specially such as are contrary to the provisions of the said Acts, having reference to fraud and fraudulent preferences, and to the enregistration of marriage contracts within the Province of Quebec; and as to all such contracts, acts, matters and things, the provisions of the said Acts shall remain in force, and shall be acted upon as if this Act had never passed; Provided always that as respects matters of procedure merely, the provisions of this Act shall for the future supersede those of the said Acts even in cases commenced and now pending; and all securities given under the said Acts shall remain valid, and may be enforced, in respect of all matters and things falling within their terms, whether before or after this Act shall come into force and specially all securities heretofore given by Official Assignees shall serve and avail hereafter as if given under this Act; and all other Acts and parts of Acts now in force in any of the said Provinces which are inconsistent with the provisions hereof are also hereby repealed.

Proviso :
Procedure
under this
Act to apply
and super-
sede that
under Act of
1864.

Short title,
commence-
ment and
duration of
Act.

155. This Act shall be called and known as "The Insolvent Act of 1869," and shall come into force and take effect on and after the first day of September next, and shall cease to have effect at the end of four years thereafter, save as regards proceedings then in progress.

APPENDIX OF FORMS.

FORM A.—(*Vide* SEC. 3.)

Insolvent Act of 1869.

In the matter of ——— an Insolvent.

The Insolvent has made an assignment of his estate to me, and the creditors are notified to meet at ——— in ——— on ——— the ——— day of ——— at (*eight*) o'clock ——— to receive statements of his affairs, and to appoint an Assignee. (*Date and residence of Interim Assignee.*)

(*Signature.*)

Interim Assignee or Guardian.

(*The following is to be added to the notices sent by post.*)

The Creditors holding direct claims and indirect claims, maturing before the meeting, for one hundred dollars each and upwards, are as follows (*names of Creditors and amounts due*): and the aggregate of claims under one hundred dollars is \$——.

(*Date.*)

(*Signature.*)

Interim Assignee or Guardian.

FORM B.—(Vide SEC. 3.)

Insolvent Act of 1869.

In the matter of A. B., an Insolvent.

Schedule of Creditors.

1. Direct liabilities.

NAME.	RESIDENCE.	NATURE OF DEBT.	AMOUNT.	TOTAL.
2. Indirect liabilities, maturing before the day fixed for the first meeting of creditors.				
NAME.	RESIDENCE.	NATURE OF DEBT.	AMOUNT.	
3. Indirect liabilities, maturing after the day fixed for the first meeting of creditors.				
NAME.	RESIDENCE.	NATURE OF DEBT.	AMOUNT.	
4. Negotiable paper, the holders of which are unknown.				
DATE.	NAME OF MAKER.	NAMES LIABLE TO INSOLVENT.	WHEN DUE.	AMOUNT.

FORM C.—(*Vide* SEC. 7.)*Insolvent Act of 1869.*

This assignment made between ——— of the first part, and ——— of the second part, witnesses,

(*or*)

On this ——— day of ——— before the undersigned notaries ——— came and appeared ——— of the first part, and ——— of the second part, which said parties declared to us, Notaries:—

That under the provisions of "The Insolvent Act of 1869," the said party of the first part, being insolvent, has voluntarily assigned and hereby does voluntarily assign to the said party of the second part, accepting thereof as interim Assignee under the said Act, and for the purposes therein provided, all his estate and effects, real and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as Interim Assignee for the purposes and under the Act aforesaid.

In witness whereof, &c.

(*or*)

Done and passed, &c.

FORM D.—(*Vide* SEC. 7.)*Insolvent Act of 1869.)*

In the matter of A. B., an Insolvent.

This deed of transfer made under the provisions of the said Act between (C. D.,) ——— Interim Assignee to the estate of the said Insolvent of the first part; and (E. F.,) ——— of the second part, witnesses:

That whereas by a resolution of the creditors of the insolvent, duly passed at a meeting thereof duly called and held at ——— on the ——— day of ———, the said party of the second part was duly appointed Assignee to the estate of the said Insolvent: Now therefore these presents witness that the said party of the first part, in his said capacity, hereby transfers to the said party of the second part the estate and effects of the said Insolvent, in conformity with the provisions of the said Act; and for the purposes therein provided.

In witness whereof, &c.

(*This form may be adapted in the Province of Quebec to the notarial form of execution of documents prevailing there.*)

FORM D D.—(*Vide* SEC. 9.)*Insolvent Act of 1869.*

In the matter of ———, an Insolvent.

This instrument witnesseth, that a meeting of the creditors of the Insolvent having been duly called by advertisement, to be held at ———, in ———, at ——— o'clock, this day, for the appointment of an Assignee to the Insolvent's estate, such meeting was duly held, and ——— was duly appointed thereat to be such Assignee (*or no appointment of Assignee was made at such meeting; or no meeting was held by reason of no creditor attending such meeting; or the appointment ——— to be such Assignee made at the said meeting became of no effect by reason of his refusal to accept the same*) by means whereof the said ——— (*the Interim Assignee*) became Assignee to the said estate.

Place ———, date ———.

Signatures of Chairman and of Creditors ———, or of Interim Assignee.

The said (*Interim Assignee*) being duly sworn deposeth that the foregoing declaration is true: and he hath signed.

Sworn before me at ———

——— this ———

——— Judge. }

FORM E.—(*Vide* SEC. 14.)*Insolvent Act of 1869.*To (*name ——— residence ——— and description of Insolvent*).

You are hereby required, to wit, by A. B., a creditor for the sum of \$—— (*describe in a summary manner the nature of the debt*), and by C. D., a creditor, &c., to make an assignment of your estate and effects under the above Act, for the benefit of your creditors.

Place ———, date ———.

(*Signature of creditor or creditors.*)FORM F.—(*Vide* SECS. 19 & 20.)*Insolvent Act of 1869.*

CANADA, PROVINCE OF ———, District of ———.

A. B. ——— (*name, residence and description*).

Plaintiff.

*vs.*C. D. ——— (*name, residence and description*).

Defendant.

I, A. B. ——— (*name, residence and description*), being duly sworn, depose and say:

1. I am the Plaintiff in this cause (*or one of the Plaintiffs, or the clerk, or the agent of the Plaintiff in this cause duly authorized for the purposes hereof*);

2. The defendant is indebted to the Plaintiff (*or as the case may be*) in the sum of — dollars currency for (*state concisely and clearly the nature of the debt*);

3. To the best of my knowledge and belief the defendant is insolvent within the meaning of the Insolvent Act of 1869, and has rendered himself liable to have his estate placed in compulsory liquidation under the said Act; and my reasons for so believing are as follows: (*state concisely the facts relied upon as rendering the debtor insolvent and as subjecting his estate to be placed in compulsory liquidation*).

And I have signed (*or I declare that I cannot sign*);
this — day of — 186—.

(*And if the deponent cannot sign, add*)—the foregoing affidavit having been first read over by me to the deponent.

—◆—
FORM G.—(*Vide SECS. 19 & 20.*)

Insolvent Act of 1869.

CANADA, PROVINCE OF — *District of* —

VICTORIA, *by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.*

To the Sheriff of our District (*or County*) of — No. — GREETING:

WE command you at the instance of — to attach the estate and effects, moneys and securities for money, vouchers, and all the office and business papers and documents of every kind and nature whatsoever, — of and belonging to — if the same shall be found in (*name of district or other territorial jurisdiction*) and the same so attached, safely to hold, keep and detain in your charge and custody, until the attachment thereof, which shall be so made under and by virtue of this Writ, shall be determined in due course of Law.

We command you also to summon the said — to be and appear before us, in our — Court for — at — in the County (*or District*) of — on the — day of — to show cause, if any he hath, why his estate should not be placed in liquidation under the Insolvent Act of 1869, and further to do and receive what, in our said Court before Us, in this behalf shall be considered; and in what manner you shall have executed this Writ, then and there certify unto Us with your doings thereon, and every of them, and have you then and there also this Writ.

IN WITNESS WHEREOF, We have caused the Seal of our said Court to be hereunto affixed, at — aforesaid, this — day of — in the year of our Lord, one thousand eight hundred and sixty— in the — year of our Reign.

INSOLVENT ACT OF 1869:

FORM H.—(*Vide* SEC. 22.)*Insolvent Act of 1869.*

A. B., *Plaintiff.*
C. D., *Defendant.*

A writ of attachment has issued in this cause.

Place ———, date ———.

(*Signature*)

Sheriff.

FORM I.—(*Vide* SEC. 36.)*Insolvent Act of 1869.*

In the matter of ——— A. B. (or A. B. & Co.), ——— an insolvent.

I, the undersigned (*name and residence*), have been appointed assignee in this matter.

Creditors are requested to file their claims before me, within one month.

Place ———, date ———.

(*Signature*)

Assignee.

FORM K.—(*Vide* SEC. 46.)*Insolvent Act of 1869.*

In the matter of ——— A. B., ——— an Insolvent.

In consideration of the sum of \$—— whereof quit; C. D., assignee of the insolvent, in that capacity hereby sells and assigns to E. F. accepting thereof, all claim by the Insolvent against G. H. of (*describing the Debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D., *Assignee.*

E. F.

FORM L.—(*Vide* SEC. 48.)

This deed, made under the provisions of the Insolvent Act of 1869, the ——— day of ———, &c., between A. B. of ———, &c., in his capacity of Assignee of the estate and effects of ——— an insolvent, under a deed of assignment executed on the ——— day of ——— at ——— in ——— and of a release made and executed on the ——— day of ——— in ———, (*or under an order of the Judge made at ——— on the ——— day of ———*) of the one part, and C. D., of ———, &c., of the other part, witnesseth: That he, the said A. B., in his said capacity, hath caused the sale of the real estate hereinafter mentioned, to be advertised as required by law, and hath adjudged (*or and hath offered for sale pursuant to such advertisement, but the bidding therefor being insufficient did withdraw the same from such sale, and hath since by authority of the Creditors agree to sell*) and doth hereby grant, bargain,

sell, and confirm the same, to wit: unto the said C. D., his heirs and assigns for ever, all (*in Ontario, Nova Scotia and New Brunswick, insert "the rights and interests of the Insolvent in"*) that certain lot of land, (&c., *insert here a description of the property sold*): To have and to hold the same, with the appurtenances thereof, unto the said C. D., his heirs and assigns for ever. The said sale is so made for and in consideration of the sum of \$—— in hand paid to the said C. D. to the said A. B., the receipt whereof is hereby acknowledged (*or of which the said C. D. hath paid to the said A. B., the sum of —— the receipt whereof is hereby acknowledged*) and the balance, or sum of \$—— the said C. D. hereby promises to pay the said A. B., in his said capacity, as follows, to wit—(*here state the terms of payment*)—the whole with interest payable —— and as security for the payments so to be made, the said C. D. hereby specially mortgages and hypothecates to and in favour of the said A. B., in his said capacity, the lot of land and premises hereby sold. In witness, &c.

Signed, sealed, and delivered
in the presence of E. F.

A. B. [L. S.]
C. D. [L. S.]

—◆—
FORM M.—(*Vide* SEC. 68.)

Insolvent Act of 1869.

In the matter of —— A. B. (*or* A. B. & Co.), —— an Insolvent.

A dividend sheet has been prepared, open to objection, until the —— day of —— after which dividend will be paid.

Place ——, date ——.

Signature of Assignee.

—◆—
FORM N.—(*Vide* SEC. 101.)

Insolvent Act of 1869.

CANADA, PROVINCE OF —— District (*or County*) of ——.

In the (*name of Court*) —— In the matter of A. B. (*or* A. B. & Co.), an Insolvent.

The undersigned has filed in the office of this Court, a consent by his creditors to his discharge (*or* a deed of composition and discharge executed by his creditors), and on —— the —— day of —— next, he will apply to the said Court (*or* to the Judge of the said Court, *as the case may be*) for a confirmation of the discharge thereby effected.

Place ——, date ——.

(Signature of Insolvent, or of his Attorney *ad litem*.)

—◆—
FORM O.—(*Vide* SEC. 102.)

Insolvent Act of 1869.

CANADA, PROVINCE OF —— District (*or County*) of ——.

In the (*name of Court*) —— In the matter of A. B., an Insolvent.
To the said Insolvent.

Take notice that the undersigned creditor hereby requires you to file in the office of this Court, the consent of your creditors, (*or* the deed of composition and discharge executed by them), under which you claim to be discharged under the said Act; and on — the — day of — next, at ten of the clock in the forenoon, or as soon as counsel can be heard, the undersigned will apply to the said Court (*or* to the Judge of the said Court, *as the case may be*) for the annulling of such discharge.

Place —, date —.

(Signature of Creditor, or of his Attorney *ad litem*.)

—♦—
FORM P.—(*Vide* SEC. 105.)

Insolvent Act of 1869.

CANADA, PROVINCE OF — District (*or County*) of —.

In the (*name of Court*) —. In the matter of A. B. (*or* A. B. & Co.), an insolvent.

On — the — day of — next, the undersigned will apply to the said Court (*or* the Judge of the said Court, *as the case may be*) for a discharge under the said Act.

Place —, date —.

(Signature of the Insolvent, or his Attorney *ad litem*.)

—♦—
FORM Q.—(*Vide* SEC. 122.)

Insolvent Act of 1869.

In the matter of — A. B., — an insolvent, and — C. D., — Claimant.

I, C. D., of —, being duly sworn in — depose and say:

1. I am the claimant (*or*, the duly authorized agent of the claimant in this behalf, and have a personal knowledge of the matter hereinafter deposed to, *or* a member of the firm of — claimants in the matter, and the said firm is composed of myself — and of E. F., of —).

2. The insolvent is indebted to me (*or* to the claimant) in the sum of — dollars, for (*here state the nature and particulars of the claim, for which purpose reference may also be made to accounts or documents annexed*).

3. I (*or* the claimant) hold no security for the claim, (*or* I *or* the claimant) hold the following, and no other, security for the claim namely: (*state the particulars of the security*.)

To the best of my knowledge and belief, the security is of the value of — dollars.

Sworn before me at — this — day of —.

And I have signed.

TARIFF OF FEES.

(OF DECEMBER, 1864.)

For Insolvency proceedings in Ontario, promulgated by the Judges of the Superior Courts of Common Law, and of the Court of Chancery, under 27 and 28 Victoria, c. 17.

TARIFF.

Fees to solicitor or attorney, as between party and party, and also as between solicitor and client :—

Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal.....	\$2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, declarations, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words or under	0 20
Making other copies when required	0 10
When more than <i>five</i> copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies drawing schedule, list, or notice of liabilities, per folio, when the number of creditors therein does not exceed twenty	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty	0 10
Every common affidavit of service of papers, including attendance..	0 50
Every common attendance	0 50
Every special attendance on judge	2 00
For every hour after the first	1 00
To be increased by the judge in his discretion	
Every special attendance at meetings of creditors, or before assignee, acting as arbitrator.....	1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance	2 00
Fees on rule of Court or order of judge	1 00

	\$	c.
Fee on sub ad test., including attendances	1	00
Fee on sub duces tecum, including attendance	1	25
And, if above 4 folios, then for each additional folio, over such 4 folios	0	10
Fee on every other writ	1	00
Every necessary letter	0	50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary cases, where no dispute	1	00
Costs of solicitor of petitioning creditor, for examining claims filed up to appointment of assignee, for each claim so examined	0	50
Cost of assignee's solicitor for examining each claim required by assignee to be examined	0	50
Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto	1	00
Preparing, engrossing, and procuring execution of bonds or other instruments of security	2	00
Mileage for the distance actually and necessarily travelled—per mile	0	10
Bill of Costs, engrossing, including copy for taxation, per folio	0	20
Copy for the opposite party	0	50
Taxation of Costs	0	50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same, as for like proceedings, in the tariffs of the Superior Courts.

COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

FEE FUND.

Every warrant issued against estate and effects of insolvent debtors.	\$1	00
Every other warrant or writ	0	30
Every summary rule, order or fiat	0	30
Every meeting of creditors before judge	0	50
If more than an hour	1	00
If more than one on same day, \$2, to be apportioned amongst all.		
Every affidavit administered before judge	0	20
Every certificate of proceedings by judge of County Court for transmission to a Superior Court or a judge thereof	0	50
Every bankrupt's certificate	1	00
Every taxation of costs	0	15

TARIFF OF FEES.

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FEES TO CLERK.

	\$	c.
Every Writ, or Rule, or Order	0	50
Filing every affidavit or proceeding	0	10
Swearing affidavit	0	20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words	0	10
Every certificate	0	30
Taxing costs	0	50
Taxing costs and giving allocatur.....	0	65
For every sitting under commission, per day	1	00
If more than one on same day, \$2, to be apportioned amongst all.		
Fee for keeping record of proceedings in each case.....	1	00
For any list of debtors proved at first meeting, (if made)	0	50
For any list of debtors at second meeting	0	50
Any search.....	0	20
A general search relating to one bankruptcy, or the bankruptcy of one person or firm	0	50

SHERIFF.

Same as on corresponding proceedings in Superior Courts.

WITNESSES.

Same as in Superior Courts.

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